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1964. On October 19, 1964, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### **QUESTION PRESENTED**

Whether the constitutional privilege provided by Article I, Section 6, for "any speech or debate" in Congress bars criminal prosecution of a Congressman for his acceptance of money to make a speech in Congress.

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Article I, Section 6, of the United States Constitution provides in part:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

18 U.S.C. 281, which was repealed subsequent to the commission of the acts involved in this case, provided in pertinent part:

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency



thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U.S.C. 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

#### STATEMENT

Count 1 of an indictment returned in the District of Maryland charged that respondent and Frank W. Boykin, then Congressmen, conspired with two others between April 1960 and December 31, 1960, to defraud the United States of its right to have the Congressmen's duties performed free from corruption and uninfluenced by payments of money, and to have the business of the Department of Justice conducted impartially. It was charged that the Congressmen attempted to persuade the Department of Justice to postpone and dismiss an indictment pending against

persons connected with the First Colony Savings and Loan Association, and that, as part of the conspiracy, petitioner was paid to make a speech in Congress defending the operation of independent savings and loan associations (R.A. 1-19).<sup>1</sup> Seven other counts of the indictment charged that respondent, aided by the other defendants, was paid to intercede with Justice Department officials to persuade them to postpone and dismiss the pending indictment in violation of the conflict-of-interest statute, 18 U.S.C. 231 (R.A. 19-30). After a trial by jury, all defendants were convicted. Petitioner was sentenced to imprisonment for a concurrent period of six months on each count. He was also fined \$5000 on the conspiracy count (R.A. 44-45).

On appeal, the court of appeals found the evidence "more than sufficient to support the jury's verdict" (App. A, *infra*, p. 48). It reversed respondent's conviction on count 1, however, on the ground that the "Speech or Debate" privilege of Article I, Section 6 bars a criminal prosecution of a Congressman for accepting money to make a speech in Congress (App. A, *infra*, pp. 17-30). It remanded for a new trial his conviction on the substantive counts, holding that evidence of this speech prejudiced his trial on these counts. The convictions of the other defendants were affirmed (App. A, *infra*, p. 57).

In brief, the evidence showed that in 1960 and 1961, J. Kenneth Edlin, the dominant figure in two Maryland savings and loan institutions (First Colony

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<sup>1</sup> "R.A." refers to respondent's appendix in the court of appeals; "G.A." refers to the government's appendix in that court.

and First Continental), was under indictment for mail fraud in connection with activities of First Colony (R.A. 177, 256, 265-266). In April 1960, Edlin and defendant Robinson, an associate of Edlin's, consulted Martin Heflin, a public relations counselor, for the purpose of having a speech delivered in Congress on behalf of independent savings and loan associations (R.A. 180-184). After meeting with respondent, Heflin and Robinson supplied material for a proposed speech to respondent's administrative assistant (R.A. 189-190; G.A. 266-267). On June 20, 1960, Robinson sent respondent a check for \$500 (R.A. 564). On June 30, 1960, respondent delivered a speech in Congress defending independent savings and loan associations (R.A. 931-937). Either immediately before or immediately after the speech was made, Edlin displayed a copy of its text, commenting that there was no reason to fear the mail fraud indictment (G.A. 266).<sup>2</sup> Reprints of the speech were used to induce prospective savers to deposit money in First Continental (G.A. 275-276).

Between August 1960 and March 1961, respondent received \$3700 in checks from Robinson (Tr. 197-199, 716-728, 957-958). Between March and October 1961, respondent and Congressman Boykin visited officials of the Department of Justice to discuss the pending mail fraud indictment against Edlin in an attempt to convince the Department that it was unjust

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<sup>2</sup> Early in June, Robinson informed Edlin's secretary that Congressman Johnson was "on our payroll," and Edlin made a similar statement without naming the Congressman (R.A. 161-163).

(R.A. 838-841, 357-359). During this period, respondent received \$20,550 from Robinson and First Continental (G.A. 268-275, 281-290, R.A. 674-681).

In his defense, respondent claimed that he delivered the speech in response to a newspaper article and in order to create an issue for a forthcoming congressional campaign. He said that the \$500 check was a campaign contribution (R.A. 565-569; G.A. 362-365). He testified that the other payments were for the performance of various legal services (see, *e.g.*, R.A. 575 *ff.*; G.A. 380 *ff.*).

In reversing respondent's conviction, the court of appeals held that the constitutional privilege of Article I, Section 6 deprives a court of jurisdiction to try a member of Congress on a criminal charge of accepting money to make a speech in Congress (App. A, *infra*, pp. 17-30). It ruled "that the Constitution has clothed the House of which he is a member with the sole authority to try him" (App. A, *infra*, p. 26). It deemed this interpretation of the Constitution necessary in order "to promote the independence of all congressmen" and "[t]o avoid restraint on free expression on the floor of either House" (App. A, *infra*, p. 28).

#### REASONS FOR GRANTING THE WRIT

1. The court of appeals has held that a Congressman is protected by the constitutional privilege of Article I, Section 6 against any criminal prosecution for receiving money in exchange for delivering a speech on the floor of Congress. While this precise question is itself of obvious importance because it affects public confidence in the integrity of Congress-

sional debate, the consequences of the decision extend beyond mere debate. For, as this Court observed in *Tenney v. Brandhove*, 341 U.S. 367, 372, the constitutional privilege, like its common law counterpart, embraces "[f]reedom of speech *and action* in the legislature \* \* \*." (Emphasis added.) See *Kilbourn v. Thompson*, 103 U.S. 168, 201. Hence the reasoning of the court of appeals in this case might be thought to bar any prosecution of a Congressman for bribery even if what the Congressman sold was his vote rather than his speech. The effect of this decision, therefore, is to cast doubt upon anti-bribery legislation, first enacted more than a century ago to provide sanctions against the receipt of corrupt payments by Congressmen. Act of February 26, 1853, Section 6, 10 Stat. 171. See 18 U.S.C. 201 (Supp. V).

The fact that this is a case of first impression does not detract from its importance. The issue affects public confidence in Congressional debate—certainly a matter of great national significance. Moreover, if the court of appeals correctly concluded that the only remedy lies with Congress itself, the issue should be conclusively settled so that Congress may establish such machinery as is appropriate to deal with matters of this kind.

2. With regard to the merits, we believe that the court of appeals erred in assuming that in such a prosecution a legislative speech or debate is being "questioned" within the meaning of Article I, Section 6 of the Constitution. When a Congressman is prosecuted for having accepted money in exchange for a

speech, it is his antecedent conduct in agreeing to accept or accepting the bribe which is "questioned," and not the speech as such. That this is so may be demonstrated by considering a hypothetical case in which the Congressman accepts a bribe with corrupt intent but fails thereafter to carry out his bargain and does not make the speech. If he is then prosecuted, no speech will be "questioned" because no speech will have been made. The fact that the Congressman in this case fulfilled his promise and delivered the corrupt speech should not render the entire course of conduct constitutionally protected.

The same distinction is drawn with respect to other privileges recognized by law. A judge may not be held civilly or criminally answerable for the contents of any judicial decision. *E.g., Bradley v. Fisher*, 13 Wall. 335. But it has never been thought that this privilege clothes a judge with immunity from prosecution for accepting a bribe. Notwithstanding the Constitution's provision for impeachment of judges guilty of misconduct, the first Congress, many of whose members were closely identified with the drafting of the Constitution, enacted a statute providing criminal sanctions against judges who take bribes. Act of April 30, 1790, Sec. 21, 1 Stat. 112, 117. See *United States v. Manton*, 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664. In the prosecution of a judge for taking a bribe, the judge's corrupt judicial decision is evidence of the offense, but the decision as such is not being "questioned" as it would be, for example, if the judge were sued for

libel. In the latter case the act of rendering the decision constitutes the alleged offense; in the former, that act is merely evidence of the offense.<sup>3</sup>

We submit that the court of appeals' apprehension that prosecutions for bribery and allied crimes would interfere with legislative independence is not well founded (p. 28, *infra*). Congress itself obviously had no such concern when it provided for criminal punishment of Congressmen who accept bribes. 10 Stat. 171 (1853). More recently, in a comprehensive revision of the bribery, graft and conflicts-of-interest laws, it included Congressmen in a statute covering bribery of public officials. Act of October 23, 1962, 76 Stat. 1119, 18 U.S.C. 201 (Supp. V). Rather than operating as a restraint, such statutes help to eliminate suspicions that a legislator's acts are corruptly motivated and promote public confidence in the integrity of Congress. The Congressional preference for criminal prosecution, rather than a legislative proceeding, in cases involving such corruption is readily understandable. The criminal penalty places a Congressman's conduct under inquiry only if a grand jury determines that there is probable cause to believe that he has betrayed the public trust. It

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<sup>3</sup> Similarly, the privilege recognized in *Barr v. Matteo*, 360 U.S. 564, could not conceivably extend to cases in which government officials are bribed to perform acts of the sort which are within the scope of their authority. Under the reasoning of the court of appeals in this case, such officials could never be prosecuted for bribery without violating the privilege since a bribery prosecution would "question" the motives behind the official act.



gives accused legislators the benefits of all the constitutional guarantees applicable in the trial of criminal cases. It provides an impartial tribunal to protect an unpopular Congressman from a politically motivated legislative tribunal. And it proceeds on the sound premise that in matters involving wrongdoing outside the halls of Congress, the courts provide a better forum for determining guilt or innocence. In applying this section of the Constitution, which was designed to promote legislative independence, Congress' judgment that such criminal prosecution does not restrain parliamentary freedom is entitled to great weight. Moreover, in the analogous area of judicial privilege, criminal prosecution for bribery does not appear to have interfered with the independence of the judiciary.

Finally, other jurisdictions which recognize the legislative privilege do not apply that privilege to criminal prosecutions for taking money. A case in which the problem was squarely presented and decided adversely to the claim of privilege was *Rex v. Boston*, 33 C.L.R. 386 (1923) (Australia). See, also, *Regina v. White*, 13 S.C.R. (N.S.W.) 322 (1875); *Regina v. Bunting*, 7 O.R. 524 (1885).<sup>1</sup>

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<sup>1</sup> *Tenney v. Brandhove*, 341 U.S. 367, 378, held that State legislators were not subject to civil liability for legislative acts and that a court may not inquire into the motives of legislators when those acts constitute the basis for a civil claim. The court of appeals erred in treating that decision as requiring it to hold that Congress may not subject its own members to criminal prosecution for violations of federal statutes based essentially not on what legislators do on the floor of Congress but on criminal acts committed outside of Congress.



## CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.<sup>5</sup>

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NOVEMBER 1964.

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<sup>5</sup> We also wish to reserve the right to argue that the reversal of the conspiracy court in this case did not require reversal of the substantive courts, none of which involved the speech made on the floor of Congress.

## APPENDIX A

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United States Court of Appeals for the Fourth  
Circuit

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No. 9223

UNITED STATES OF AMERICA, APPELLEE  
vs.

THOMAS F. JOHNSON, J. KENNETH EDLIN, AND  
WILLIAM L. ROBINSON, APPELLANTS

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APPEALS FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

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ROSZEL C. THOMSEN, DISTRICT JUDGE

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(Argued April 16, 1964. Decided September 16,  
1964)

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Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit  
Judge, and BUTZNER, District Judge

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SOBELOFF, Chief Judge:

Two members of the United States Congress and two other persons were jointly indicted for violations of both the conspiracy statute, 18 U.S.C.A. § 371, and the conflicts of interest statute, 18 U.S.C.A. § 281.<sup>1</sup>

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<sup>1</sup> See pre-trial opinion of District Court, *United States v. Johnson*, 215 F. Supp. 300 (D. Md. 1963).

After a jury trial the four defendants were convicted. One, Frank W. Boykin, a Representative from Alabama, paid his fine and has not appealed. This is the appeal of Representative Thomas F. Johnson of Maryland, and J. Kenneth Edlin and William L. Robinson.

The indictment was in eight counts. The first charged a conspiracy "to defraud the United States \* \* \* (a) Of \* \* \* its right to have \* \* \* the official business of the Department of Justice, conducted honestly \* \* \*. (b) Of \* \* \* its right to have \* \* \* personnel of the Department of Justice, free \* \* \* of \* \* \* unlawful, improper and undue pressure \* \* \*. (c) Of \* \* \* its right to have the lawful functions and duties of the defendants THOMAS F. JOHNSON and FRANK W. BOYKIN \* \* \* free from corruption \* \* \*. (d) Of \* \* \* its right not to be deprived of the faithful, loyal and conscientious services of the defendants THOMAS F. JOHNSON and FRANK W. BOYKIN \* \* \*." This count alleged that as part of the conspiracy Johnson was paid to make a speech in Congress and to persuade officials of the Department of Justice to cause the postponement and eventual dismissal of a criminal action then pending against Edlin.

The remaining seven counts charged Johnson with the substantive offenses of receiving payment for representing Edlin before the Justice Department. 18 U.S.C.A. § 281. In these counts Robinson and Edlin were charged as aiders and abettors.

## I. THE INDICTMENT

### A. FIRST COUNT—CONSPIRACY

The appellants attack the validity of count one on two broad fronts. First, they say that in general

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\* Paragraph 14, subparagraphs (a) to (d) of the indictment.

conspiracy indictments should not be tolerated because of the abuses which they engender. Second, they contend that this particular indictment is defective in a number of ways.

### 1. *Alleged Invalidity of Conspiracy Indictments*

The appellants' criticism of conspiracy indictments is not wholly without foundation. They are not the first to express the view. Similar statements can be found in concurring and dissenting opinions in the Supreme Court and in a number of Law Review articles. *Krulewitch v. United States*, 336 U.S. 440, 445-48 (1949); *Kotteakos v. United States*, 328 U.S. 750, 760-74 (1946). Goldstein, "Conspiracy to Defraud the United States," 68 Yale L.J. 405 (1958). The dragnet effect of conspiracy indictments, their sometime indiscriminate use and the unfair advantage they may give to the prosecution in respect to evidence and proof are well known. While this is true, the Supreme Court has not said that conspiracy indictments as such are improper; convictions based upon them have been repeatedly upheld. The net effect of the Court's expressions of concern is an admonition to scrutinize carefully the allegations of such indictments and the proof adduced in their support.

### 2. *Specific Attacks on First Count*

#### a. Vagueness and indefiniteness

The appellants insist that count one is indefinite and vague and fails to inform them of the charge alleged. Our reading of the count does not confirm this contention. The count alleges a conspiracy "to defraud the United States." Subparagraph (a) to (d) of paragraph 14, summarized above, enumerate four governmental functions and rights which are alleged to have

been defrauded. It was not necessary to allege that the Government had been defrauded of money or property. Section 371 has consistently been interpreted to support an indictment charging that a lawful function of the Government has been interfered with or obstructed. *Hammerschmidt v. United States* 265 U.S. 182 (1924); *Curley v. United States*, 130 Fed. 1 (1st Cir.), *cert. denied*, 195 U.S. 628 (1904); *Haas v. Henkel*, 216 U.S. 462 (1910).

Paragraphs 15 to 25 of count one state the objects and purposes of the conspiracy. Thereafter 75 overt acts are alleged. Contrary to the appellants' contentions, the indictment did not give the Government carte blanche to introduce evidence and frame any imaginable purpose of the conspiracy. In plain and concise language the paragraphs 15 to 25 effectively define the objects and delineate the proof. This is all that Rule 7(c)<sup>3</sup> of the Rules of Criminal Procedure requires. See *May v. United States*, 175 F. 2d 994 (D.C. Cir.), *cert. denied*, 333 U.S. 830 (1949); *United States v. Manton*, 107 F. 2d 834 (2d Cir. 1938), *cert. denied*, 309 U.S. 664 (1940).

#### b. Duplicity

Because count one alleges both Johnson's speech and his discussions with members of the Justice Department, the appellants maintain that it is duplicitous. The short and, we think, sufficient answer is that the indictment charges only one conspiracy—to defraud the United States—and this is not changed by the assertion of more than one means used to accomplish the object. "The conspiracy is the crime, and

<sup>3</sup> "7(c) The indictment \* \* \* shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. \* \* \*

that is one, however diverse its objects." *Frohwerk v. United States*, 249 U.S. 204, 210 (1919).<sup>4</sup>

c. Alleged insufficiency of allegations charging fraud

We must also reject the argument that count one was fatally defective because it failed to charge any false statement, misrepresentation or deceit. In *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924), the Supreme Court defined the word "defraud" as used in what is now section 371:

"To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." (Emphasis added.)

Since *Hammerschmidt*, numerous cases have held that the payment of money by a private person to an official of the Government for the performance of an official act constitutes a fraud. *United States v. Manton*, *supra*; *Glasser v. United States*, 315 U.S. 60 (1942); *May v. United States*, *supra*; *United States v. Bowles*, 183 F. Supp. 237 (S.D. Me. 1958). *Glasser* really closed the debate. There the Court, citing *Hammerschmidt*, said:

"The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a 'defrauding' within the meaning of [section 371] of the Criminal Code." 315 U.S. at 66.

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<sup>4</sup> See also *United States v. Manton*, *supra*, and *May v. United States*, *supra*, where the same contention was raised and rejected.

The indictment in paragraphs 15 to 25 explicitly stated that it was a part of the conspiracy for appellant Johnson to receive compensation from appellants Edlin and Robinson. Manifestly this is a "dishonest means," in the *Hammerschmidt* phrase, and is sufficient to support an indictment under section 371.

d. The alleged impossibility of defrauding the Justice Department

Appellant Edlin contends that the conspiracy count must fail because it was impossible to defraud the United States in connection with the criminal charge pending against him. His position is that it was not within the power of the Department of Justice to effectuate a postponement of the trial or a dismissal of the indictment, because that power was solely in the court. The argument is specious: It is true that the court's consent would be required to dismiss a pending charge, Rule 48(a), Fed. R. Crim. P., but in a practical sense, as the Department is in charge of the prosecution, its decision to postpone a trial, or even to abandon a case, has great, if not decisive, influence with the court.

e. Congressional privilege

Appellant Johnson's principal contention is that insofar as the indictment questions his motivation in making a speech on the floor of the House, it contravenes Article I, section 6 of the Constitution.

"The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases except Treason, Felony and Breach of the Peace, be privileged from Arrest during

their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." (Emphasis added.)

This is the first case, within our knowledge, squarely raising the question whether the congressional privilege deprives a court of jurisdiction to try a member on a criminal charge of accepting money to make a speech in the House of which he is a member.

The history of the parliamentary privilege is a long and turbulent one, developed in the course of conflict between Parliament and the Crown as to the proper subjects of discussion on the floor of Parliament.<sup>6</sup> The Crown asserted that matters then under debate in Parliament were within the King's prerogative, while Parliament insisted that it was protected by the privilege. Particularly disconcerting to the Crown was Parliament's intrusion into matters affecting the succession and into questions of religion. During the reigns of both Queen Elizabeth and James I the Crown resisted Parliament's expansion of its independence. More than once, members of Parliament were committed to the Tower.<sup>7</sup>

The accession of Charles I brought continued conflict.<sup>7</sup> In 1629 three members of the House of Commons, Sir John Elliot, Denzill Holles and Benjamin Valentine, when arrested and prosecuted for libelous

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<sup>6</sup> See generally May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (16th ed. 1957); Wittke, *The History of English Parliamentary Privilege* (Ohio State University 1921).

<sup>6</sup> Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time*, 249 (11th ed. 1960).

<sup>7</sup> Chrimmes, *English Constitutional History*, 151-53 (2d ed. 1953).



and seditious speeches, pleaded to the jurisdiction of the court. They maintained that they were punishable, if at all, only in Parliament. The King's Bench rejected their plea and convicted them, Judge Sir William Jones observing: "We are the judges of their lives and lands; therefore of their liberties." 3 Howell, State Trials, 296, 306. The decision was very unpopular and contributed to the eventual downfall of Charles.\*

Immediately after the Revolution of 1688, Parliament enacted the Bill of Rights containing the following declaration: "[T]hat the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." Since then the privilege of speech and debate has never been questioned or denied.

The scope of the privilege is demonstrated in the English case, *Ex parte Wason*, 4 Q.B. 573 (1869). There the English court held that a conspiracy by a number of persons, including members of the House of Lords, to make false statements in the House was not an offense at law, because the courts were powerless to question the motives and intentions of members when speaking before the Parliament.

In the landmark case of *Stockdale v. Hansard*, 9 Adolphus & Ellis 1 (1839), Lord Denman described the privilege, by then fully developed, in these words:

"The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By conse-

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\* Wittke, *op. cit. supra*, n. 5.

quence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So if the speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer."

Early in the history of the American colonies, the privilege of speech was recognized,<sup>9</sup> and many of them placed it in their constitutions when they achieved independence.<sup>10</sup> "The provision in the

<sup>9</sup> Clarke, *Parliamentary Privilege in the American Colonies*, 71 (1943).

<sup>10</sup> See, *e.g.*, Maryland Declaration of Rights, Nov. 3, 1776 ("That freedom of speech, and debates or proceedings, in the legislature, ought not to be impeached in any other court or judicature."); Massachusetts Constitution of 1780, Art. VIII ("The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever."); New Hampshire Constitution of 1784, Part 1, Art. XXX ("The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.").

United States Constitution was a reflection of political principles already firmly established in the States." *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951).

In an 1808 Massachusetts decision by the highest court of that state,<sup>11</sup> subsequently characterized by the Supreme Court of the United States as an authoritative description of the constitutional provision, Chief Justice Parsons wrote:

"These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

What we derive from this historical review of the congressional privilege is a firm conviction that the constitutional provision is to be interpreted liberally and not narrowly. We also conclude that the general

<sup>11</sup> *Coffin v. Coffin*, 4 Mass. 1 (1808).

test to be applied where the privilege is asserted is that whenever the motivation for making a speech is called into question, the privilege applies. Two leading Supreme Court opinions confirm this view.

*Kilbourn v. Thompson*,<sup>12</sup> decided in 1880, held, among other things, that a congressman who initiates, supports and votes for a resolution calling for the arrest of another person cannot be questioned in court in a suit for malicious prosecution. In 1951, *Tenney v. Brandhove*<sup>13</sup> confirmed *Kilbourn's* holding that the courtroom is not the proper place to question the motives of legislators where they are acting within their traditional sphere. Justice Frankfurter, speaking for the Court, said:

*"The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."* 341 U.S. at 377. (Emphasis added.)

Equally broad is the textwriters' description of the privilege.<sup>14</sup> While none of them treats directly the

<sup>12</sup> 103 U.S. 168 (1880).

<sup>13</sup> 341 U.S. 367 (1951).

<sup>14</sup> 1 Blackstone, Commentaries, 164 (Cooley, 4th ed. 1899); 2 Cooley, Constitutional Limitations, 929 (8th ed. 1927); Cushing, Legislative Assemblies, § 601 (2d ed. 1866) ("[I]n

question before us, the language of each is unequivocal in attributing to the constitutional provision wide and almost absolute scope.

What we have said thus far is, we think, generally accepted. The question with which we are faced is whether these general principles become inapplicable when bribery is a motivating factor for making a speech in a legislative chamber. The Australian courts have considered the effect of the privilege where criminal prosecutions were brought against legislators for taking bribes to cast their votes and held that the privilege did not protect accused legislators. *Regina v. White*, 13 S.C.R. (N.S.W.) 332 (1875); *Rex v. Boston*, 33 C.L.R. 386 (1923). See also the Canadian case of *Regina v. Bunting*, 7 O.R. 524 (1885). These cases are not binding on us but we consider them, especially as they bear on the historic concept of the privilege.

While it is true that count one of the indictment alleges a "conspiracy to defraud the United States" and not bribery, the District Court, by citing federal and state statutes which make the acceptance of a bribe a criminal act, recognized the close relation between the two.<sup>15</sup> The District Judge also noted that

short, \* \* \* the privilege in question secures the members of a legislative assembly against all prosecutions, whether civil or criminal, on account of any thing said or done by them, during the session, resulting from the nature and in the exercise of their office."); DeLome, *The Constitution of England*, 66 (5th ed. 1885); 2 *The Works of James Wilson*, 37-38 (1896); Schwartz, *A Commentary on the Constitution of the United States*, 104 (1963); 1 *Story on the Constitution*, § 866, p. 600 (3d ed. 1858) ("The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual."); 1 *Wilmingtonby, The Constitution of the United States*, § 233 (1910).

<sup>15</sup> *United States v. Johnson*, 215 F. Supp. 300, 306 n. 6 (D. Md. 1963).

in no instance has the constitutionality of either the federal or a state bribery statute ever been questioned. Reasoning by analogy from these statutes and the state cases decided under them—which do not, however, discuss the constitutional question—the Judge concluded that “the prosecution of a Member of Congress for receiving money from a private person for making a speech on the floor of the House would not be barred by Art. I, sec. 6, cl. 1 of the Constitution.” 215 F. Supp. 300, 307 (D. Md. 1963).

Basic to the conclusion of both the District Judge and the Government is the reasoning that “[t]o hold Count One of the present indictment barred by the privilege would subvert rather than advance the purpose for which the privilege exists—the *independence of the legislator in the fulfillment of his public trust.*” 215 F. Supp. at 307. (Emphasis added.) It would be less than candid to deny the appeal of this reasoning, for one readily perceives a difference between fearless speech and corrupt speech, but after deliberate consideration we must reject the District Court’s conclusion.

Inevitably, the indictment required an inquiry into Johnson’s reason for delivering the speech, the very inquiry which the Supreme Court has explicitly declared to be beyond a court’s power. *Tenney v. Brandhove*, 341 U.S. 367 (1951). The contents of the speech as such were not challenged. In fact the indictment attacked only the purpose for which the speech was made, i.e., “to defraud the United States.” To prove this, however, the speech in its entirety was introduced into evidence and was commented upon extensively by the prosecution during the trial and in the closing arguments. Since Johnson could not deny making the speech it naturally became necessary for him to demonstrate that his purpose



for delivering it was good. But the Supreme Court has declared in *Tenney* that "[t]he claim of an unworthy purpose does not destroy the privilege." 341 U.S. at 377. The speech was more than an incidental feature of the conspiracy charged. Fully one-half of the testimony introduced at the trial related to the speech.

Federal cases discussing the privilege have repeatedly held that the good or bad faith of the member making the speech is immaterial. Indeed this is precisely the teaching of *Tenney*. In *Cochran v. Couzens*, 42 F. 2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930), for example, the complaint alleged that a Senator "[m]aliciously, wilfully, falsely and wrongfully" delivered a "scandalous, malicious and defamatory slander" in a speech on the floor of the Senate. In affirming the District Court's dismissal of the complaint, the court held that "the words forming the basis of plaintiff's action were uttered in the course of a speech in the chamber of the Senate of the United States, and were *absolutely privileged* and not subject to 'be questioned in any other place.' " 42 F. 2d 784. (Emphasis added.) The court added:

"It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted unlimited freedom in speeches or debates. The provision to that end is, therefore, grounded on public policy, and should be liberally construed. Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues. Article 1, § 5." 42 F. 2d at 784.

See also *Barsky v. United States*, 167 F. 2d 241 (D.C. Cir. 1948).

*Couzens*, we note, was a civil action, but it would be inconsistent to conclude that a corrupt speech is less within the congressional privilege when labeled a crime. It may be argued with some reason that it is not indispensable to the "independence of a legislator" to shield him from court action when he uses his office to willfully and intentionally slander another in a speech; yet, as we have seen, he cannot be called to account in a court of law for such a willful abuse. The constitutional protection against being called upon to answer in "any other place" for a speech delivered in the House is equally impaired whether the court proceedings are criminal or civil. Indeed, fear of criminal prosecution may be the graver inhibition.

*Coffin v. Coffin*, which was quoted at length by the Supreme Court in both *Kilbourn* and *Tenney*, emphasized that the privilege belongs to the Congress and was developed for the benefit of Congress as a whole. This does not mean that a member of Congress is immune from sanction or punishment. Nor does it mean that a member may with impunity violate the law; it means only that the Constitution has clothed the House of which he is a member with the sole authority to try him. In this respect the Constitution has made the Houses of Congress independent of other departments of the Government. These bodies, the Founders thought, could be trusted to deal fairly with an accused member and at the same time to do so with proper regard for their own integrity and dignity.

The broad interpretation we give to the congressional privilege does not, we believe, contravene a caveat the Supreme Court placed at the conclusion



of both the *Kilbourn* and *Tenney* opinions. In its entirety, the caveat pronounced in *Kilbourn* reads:

"It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." 103 U.S. at 204-05.

From the illustrations hypothesized in the caveat, it is plain that the Court envisioned a situation so extreme that the Congress as a whole, because of its total involvement in the corruption was incapable of taking appropriate disciplinary action against individual members. No such situation is before us, nor does this case even remotely approximate one.

All will agree that when a congressman accepts compensation for a speech, his act is reprehensible. However, the privilege being applicable, courts are barred from exercising jurisdiction, and the duty falls upon the House of Congress to punish its offending member. It is not an unfamiliar concept to bar a conviction, regardless of how contemptible the defendant's act may be, in order to protect and preserve an important constitutional principle. This is precisely the doctrine underlying the innumerable cases involving violations of the Bill of Rights and the Fourteenth Amendment. No better examples need

be cited than the recent cases of *Mapp v. Ohio*<sup>16</sup> and *Gideon v. Wainwright*.<sup>17</sup>

Judicial enforcement of the constitutional rights asserted in these two, and in similar, cases goes even further, for it often removes all possibility of punishment, while here sanctions remain unimpaired which may be imposed by the House membership.<sup>18</sup> If these sanctions be deemed insufficient in particular cases, the limitation comes from the Constitution.

A practical reason exists for invoking the congressional privilege, which meets the objective of the constitutional provision. The design is to promote the independence of all congressmen. To avoid restraint on free expression on the floor of either House, protection is given against the hazard and harassment of inquiry in any court. It is no answer, therefore, to say that if the accused member is innocent of accepting a bribe he has nothing to fear. A groundless charge may be sufficient to destroy him at the polls. Moreover, the process of indictment by a grand jury and inquiry in a court may itself be so devastating that an innocent congressman may well fear it.

It is interesting to note that the Supreme Court has recently used a similar approach in related areas involving potential impediments on constitutional rights. Discussing the oath condemned in *Baggett v. Bullitt*, — U.S. —, — (1964), Mr. Justice White said:

“The uncertain meanings of the oaths require the oathtaker—teachers and public servants—

<sup>16</sup> 367 U.S. 643 (1961).

<sup>17</sup> 372 U.S. 335 (1963).

<sup>18</sup> Art. I, § 5, cl. 2 of the United States Constitution reads. “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”

to 'steer far wider of the unlawful zone,' *Speiser v. Randall*, 357 U.S. 513, 526, than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited."

Similarly in *New York Times Co. v. Sullivan*, 376 U.S. 254,278 (1964), the court said:

"Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

In that case, Mr. Justice Goldberg in a concurring opinion quoted Judge Learned Hand's summary of the policies underlying the grant of immunity against liability to legislators, judges and executive officers. The same policies apply here.

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge

of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.' \* \* \* *Gregoire v. Biddle*, 177 F. 2d 579, 581." 376 U.S. at 302-03.

In the case of a congressman, the possibility—even the likelihood—of ultimate vindication in a court proceeding is no substitute for the guarantee held out by the Constitution.

Count one of the indictment is unconstitutional as applied to defendant Johnson. But as none of the privileges of Article I, section 6 pertain to the defendants who are not members of Congress, their attack on the first count, unlike Johnson's, is not sustained.

#### B. COUNTS 2 TO 8

We turn now to the remaining counts of the indictment. Counts 2 to 8 allege substantive violations of 18 U.S.C.A. § 281.<sup>28</sup> Each count charges that Johnson

<sup>28</sup> Section 281 provides, in part:

"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency

conferred with officials of the Justice Department in an attempt to secure the postponement and eventual dismissal of criminal charges pending against Edlin in Maryland, and that for these service he received compensation.

#### I. Venue

It is conceded that none of the services recited in the indictment was rendered in Maryland. The charge is that Johnson received seven checks—one for each of counts 2 to 8—and that he deposited them all in a Maryland bank. Four of the checks (counts 3 to 6) were drawn on a Maryland bank and three (counts 2, 7 and 8) on a Florida bank. The appellants contend that Maryland was not the proper district in which to try these substantive counts because the checks were delivered to Johnson in Washington, D.C., and that was where “compensation” was received.

Venue is more than a technical concept; it is a constitutional requirement. Article III, section 2, clause 3 commands that “[t]he Trial of all Crimes \* \* \* shall be held in the State where the said Crimes shall have been committed \* \* \*.” As pointed out by Justice Frankfurter in *United States v. Johnson*, 323 U.S. 273, 275 (1944), the Sixth Amendment “under-

thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.”

score[s] the importance of this safeguard" in requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." See also *United States v. Cores*, 356 U.S. 405 (1958).

In the case of *Burton v. United States*, 196 U.S. 283 (1905), the Supreme Court had occasion to pass upon the nature of checks as compensation. The indictment in that case charged the defendant, a United States Senator, with the receipt of various checks at St. Louis, Missouri. The case was tried in the United States District Court of Missouri where the evidence showed that the checks, drawn on a St. Louis bank, were in fact delivered in Washington, D.C. The defendant contended, unsuccessfully in the District Court, that Washington, not Missouri, was the proper venue.

The Supreme Court noted that after the defendant received the checks in Washington he endorsed and deposited them in a Washington bank. After a detailed discussion of the relevant banking laws, the Court concluded that the Washington bank became the owner of the checks upon Burton's endorsement and was not his agent for collection from the St. Louis bank. The Court then held:

"All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth and ninth counts of the indictment. The court should have, therefore, directed a verdict of not guilty on those counts." 196 U.S. at 304.

The case makes it clear that the place of the delivery of a check is not the sole determinative of venue. If it were, the Court's wrestling with banking laws to determine where the payment of the check occurred would have been needless and irrelevant. *United States v. Lotsch*, 102 F. 2d 35 (2d Cir. 1939).



*Burton* does not supply the answer as to venue for all of the substantive counts, but it is conclusive as to counts 3 to 6. In these counts it was alleged that Johnson received checks drawn on one Maryland bank and deposited them in another Maryland bank. Maryland banking law, unlike that in force in Washington, D.C., at the time of the *Burton* case, designates a bank in which a check is deposited, as an agent for collection only. 1 MD. CODE (1957), Art. 11 §§ 119, 121. This presents no problem as to counts 3 to 6, for the bank making final payment, i.e., the drawee bank, and also the bank in which the checks were deposited were both located in the District of Maryland.

The venue for counts 2, 7 and 8 is not as clear, because in these counts the drawee bank was located in Florida, while the depositing bank was in Maryland. *Burton* did not consider the effect on venue where the depositing and paying banks are in different districts.<sup>20</sup>

The Government contends further that on these three counts venue in Maryland can be supported on the theory that when a check is involved, "compensation" constitutes a continuing offense within the meaning of 18 U.S.C.A. § 3237<sup>21</sup> and that a prosecu-

<sup>20</sup> Justice Harlan dissented from the Court's opinion in *Burton*. He took the view that the Washington bank in which *Burton* deposited the check was only an agent for collection, and that the St. Louis bank, the drawee bank, was the bank making final payment. Because of this position he, unlike the other Justices, was required to consider the effect on venue where the depositing district and the payment district are different. His conclusion was that venue was properly laid in the District Court at St. Louis.

<sup>21</sup> 18 U.S.C.A. § 3237 reads, in pertinent part, as follows:

"(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United

tion can be brought for a violation of section 281 either where the check was deposited or where it was paid. The proposition is well supported.

In *Benson v. Henkel*, 198 U.S. 1, 9 (1905), a prosecution for bribery, the indictment charged that "the defendant unlawfully gave to such officer, in the District of Columbia, certain sums of money, with the intent to induce him to do an act in violation of his lawful duty \* \* \*." (Emphasis added.) The evidence showed that the defendant had mailed cash from California to the District of Columbia. The contention was that venue lay in California, where the cash was mailed, and not in Washington, where the case was tried. The Court disagreed, noting that "the case is treated as covered by sec. 731 [now 18 U.S.C.A. § 3237], providing that when an offense is begun in one District and completed in another it shall be deemed to have been committed in either, and be tried in either, as though it had been wholly committed therein."

The Government's position is that if *giving* can be considered a continuous act so too can *receiving* which is the same act viewed from the other side. We consider the analogy sound and, like the District Court, adopt it. When Johnson deposited the Florida checks in his Maryland bank for collection he started a chain of events not unlike the mailing of cash in *Benson*.<sup>22</sup>

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States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

<sup>22</sup> This conclusion does not conflict with Justice Harlan's dissent in *Burton*, noted in n. 20. The original prosecution against Senator Burton was brought in the district where, as Justice Harlan concluded, final payment was made on



We are fully advertent to certain language in the *Burton* case which, standing alone, appears to cut the other way.

"This is not a case of the commencement of a crime in one district and its completion in another, so that under the statute the court in either district has jurisdiction. Rev. Stat. sec. 731; 1 Comp. Stat. p. 585. There was no beginning of the offense in Missouri. The payment of the money was in Washington, and there was no commencement of that offense when the officer of the Rialto Company sent the checks from St. Louis to defendant. The latter did not thereby begin an offense in Missouri." 196 U.S. at 304.

We agree with the District Court that the above language does not negative the result we reach here. The *Henkel* and *Burton* cases were decided at the same term, and the Supreme Court in *Burton* was merely rejecting a government argument that one is guilty of receiving compensation at the moment a check is sent by the payer. In the instant case the indictment alleged, and the proof established, that Johnson both received and deposited the checks in Maryland.

We conclude, therefore, that the District of Maryland was a proper venue for the prosecution of the substantive counts, 2, 7 and 8, as well as 3 through 6.

## 2. Application of Section 231 to Johnson

It is the appellants' position that counts 2 to 8 fail to state an offense against Johnson because his

the check, *i.e.*, Missouri. Justice Harlan held this to be proper. In the instant case, had the original prosecution been brought in Florida, the situs of the drawee bank, the continuing offense statute would have supported venue there, as well as in Maryland.

conversations with officials of the Justice Department were in his capacity as an attorney in connection with a case pending in court. Hence they contend that section 281 covers neither Johnson as principal nor the others as aiders and abettors. The argument is hollow. Steadfastly throughout the trial Johnson maintained that he was not acting as an attorney. But even if he had maintained the contrary, the mere fact that the conversations related to a pending court proceeding would not bar a prosecution under section 281.

The purpose of section 281 is stated in *United States v. Adams*, 115 F. Supp. 731, 734-35 (D.N.D. 1953):

"It [section 281] was aimed at preventing Congressmen, officers and employees of the United States Government from using the weight of their positions or their influence in connection with matters which were to be determined before any department, agency, court martial, officer or commission and was to assist in insuring the integrity of such departmental determinations."

See also *United States v. Burton*, 202 U.S. 344, 368 (1906).

The legislative history of the predecessor to section 281 makes it clear that Congress considered and rejected a proposal to prohibit lawyer-congressmen from appearing as counsel in courts. This policy decision continues to this day, and its rationale is obvious. Governmental departments, agencies, etc., are dependent upon Congress for support, and therefore these bodies are readily susceptible to pressures from individual Senators and Representatives. Courts, on the other hand, are surrounded by protections to assure their independence. A lawyer-congressman's status and influence when he appears in open court are entirely different when he intervenes

in a departmental matter. This difference was given legislative recognition.

Senator Trumbull, Chairman of the Senate Judiciary Committee when the statute was originally considered, reported to the Senate that the Committee proposed "to restrain members of Congress \* \* \* from receiving a compensation \* \* \* for doing any business before any Department \* \* \* or anywhere else *except in the judicial tribunals* of the country." Cong. Globe, 38th Cong., 1st Sess. (1864), p. 555. (Emphasis added.) He added:

"This is not a bill to prevent attorneys from practising in courts of law, but it is a bill to prevent Representatives and Senators in Congress \* \* \* from receiving a compensation for advocating claims in the departments and before the bureaus of the government \* \* \*." Cong. Globe, 38th Cong., 1st Sess. (1864), p. 561.

While Edlin in particular stresses this history, it does not support his contention. The evidence was undisputed that Johnson did not enter his appearance in the criminal case pending against Edlin. In fact, the attorney who did represent Edlin in the criminal trial was not even aware of Johnson's efforts in behalf of Edlin.

Edlin also argues that the indictment is defective because, "[t]he plain words of § 281 confine its operation to services in proceedings *pending before any* department, agency or officer of the Government. (Emphasis added). As the District Court noted, section 281 does not use the word "pending." "The words 'before any department, agency,' etc., refer to where the services have been rendered or are to be rendered, not where the proceeding or other matter is pending." 215 F. Supp. 300, 316. The services alleged in the indictment were in relation to a matter

in which the United States was a party, namely the criminal charge pending against Edlin; and the services were performed before a department, namely the Department of Justice. As noted above, the Department did have a significant role, and it had the power to take affirmative action as a result of Johnson's visits. Counts 2 to 8 of the indictment as they pertain to Johnson are sufficient. See *United States v. Burton*, 202 U.S. 344 (1906); *United States v. Quinn*, 111 F. Supp. 870 (E.D.N.Y. 1953). Cf. *United States v. Waldin*, 122 F. Supp. 903 (E.D. Pa. 1954); *United States v. Adams*, 115 F. Supp. 731 (D.N.D. 1953).

It is not necessary for us to decide whether it is permissible for a congressman who is a lawyer to represent a client, solely before a government department, in relation to his client's court case and yet not enter his appearance in court. The District Court ruled that such activity would be permissible, if the congressman-lawyer disclosed to the department that he is appearing as an attorney and not as a congressman. This conclusion is as favorable as Johnson was entitled to demand, for in the absence of such disclosure the congressman's appearance would unquestionably violate the plain words of the statute.

### 3. *Edlin and Robinson as Aiders and Abettors*

A further objection to the validity of the indictment is pressed by appellants Edlin and Robinson. They say that under the applicable decisions no prosecution can be sustained for aiding and abetting a violation of section 281. Decisions directly in point are in conflict. *United States v. Bowles*, 183 F. Supp. 237 (D. Me. 1958), supports the appellants while *May v. United States*, 175 F. 2d 994 (D.C. Cir. 1949), is contra, as is *United States v. Quinn*, *supra*.

Relevant, but distinguishable, is *Gebardi v. United States*, 287 U.S. 112 (1932), where the Supreme Court held that in a Mann Act prosecution, a woman whose participation is limited to willfully permitting another to transport her in interstate commerce for purpose of prostitution cannot be tried as a conspirator.<sup>23</sup> See also *Nigro v. United States*, 117 F. 2d 624 (8th Cir. 1941), and *Lott v. United States*, 205 Fed. 28 (9th Cir. 1913).

But the indictment before us is different from those in the above cited cases, and the difference is decisive. This indictment does not charge that Robinson and Edlin aided and abetted in the completion of the offense merely as payers. It goes further. It charges them with a far more active role—"aiding, abetting, counselling, commanding, inducing and procuring." This charges conduct in *addition* to the mere payment of money necessary to complete a violation of section 281.<sup>24</sup>

## II. DISCLOSURE OF THE GRAND JURY TRANSCRIPT

Prior to trial, Johnson moved for the production of his grand jury testimony. He supported his motion with an affidavit setting forth his reasons. In part, the affidavit reads:

"By reason of the length of the interrogation, the intensity at times with which it was conducted and the fact that I was tired physically and mentally from my work in the House of

<sup>23</sup> Cf. *United States v. Holte*, 236 U.S. 140 (1915).

<sup>24</sup> In *Bowles* the indictment apparently averred only that the alleged aiders and abettors had paid money. The court's opinion indicated no other acts of assistance. The same is true of *Nigro* and *Lott*. Because of the difference between these cases and ours, we are not required to rule on whether mere payment would be sufficient to sustain a charge of aiding and abetting.

Representatives and my vigorous campaign for reelection on the Eastern Shore, I do not recollect a considerable part of my testimony."

The District Court denied the motion.

Later, it was disclosed that the Government, before the trial, had permitted a government witness to examine the witness' grand jury testimony. The witness' attorney was accorded the same opportunity, and together they read a volume of the transcript containing the witness' testimony and the testimony of others. The appellants moved the court for the production of all the grand jury testimony on the ground that the Government had breached "the veil of secrecy" usually surrounding grand jury records. This motion also, the court denied. But the court made available to the appellants the volume of testimony revealed by the Government. We find no error in either of these rulings.

The practice of shielding grand jury proceedings from discovery is long-established and rests on sound policy.<sup>25</sup> *Costello v. United States*, 350 U.S. 359, 362

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<sup>25</sup> Perhaps the most frequently cited justification for the practice is found in *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954). There the court summarized the reasons for the rule as follows:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

(1957); *United States v. Johnson*, 319 U.S. 503, 513 (1943). In recent years the Supreme Court has reaffirmed its commitment to this practice. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), affirming 260 F. 2d 397 (4th Cir. 1958); *United States v. Procter & Gamble*, 356 U.S. 677 (1958).

Of course, where there is a particularized need for grand jury minutes, it is within the sound discretion of the district court to require their production. *Pittsburgh Plate Glass Co. v. United States*, *supra*; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 231 (1940). But it is manifest from a reading of Johnson's affidavit that he showed no particularized need. His justification for requesting his testimony is not different from that of any other defendant. If his motion were to be granted then all similar motions would have to be granted automatically regardless of any showing of particularized need. It is difficult to imagine a defendant who could remember all of his grand jury testimony, or who was not emotionally strained when giving it. No special impact on Johnson is made to appear and there is no showing of a threatened injustice from the denial.

Likewise, the fact that the Government, in preparation for the trial, disclosed a volume of the transcript to one of its witnesses does not require the complete abandonment of secrecy. Secrecy is maintained for the benefit of the grand jury and for the betterment of grand jury proceedings. *United States v. Smyth*, 104 F. Supp. 283, 304 (N.D. Cal. 1952). Where it becomes necessary to breach the secrecy of the proceedings, it should be done "discreetly and limitedly." *United States v. Procter & Gamble*, 356 U.S. 677, 683 (1958). This is what the Judge did. He repaired any possible damage to the defendants and equalized



the situation by permitting them to examine the same testimony which was shown to the government witness.

### III. SUFFICIENCY OF THE EVIDENCE

The appellants complain that the evidence is insufficient to support the verdict. To a large extent their contentions merely repeat the arguments made in their attack on the indictment. For example, arguing the insufficiency to support a finding of a section 281 violation, Edlin reintroduces his concept of the statutes,<sup>26</sup> and follows through with the assertion that there was no evidence showing a violation of section 281 as he defines it.

The trial was long, extending over eleven weeks, and the record is mammoth, consisting of 41 volumes of 5600 pages of testimony and many exhibits. We have closely examined this mass of material and have carefully considered the arguments. To restate all of the evidence here would be a useless exercise. The posture of the case, on appeal from a judgment of conviction, requires us to view the evidence in the light most favorable to the Government. For the present purpose, a condensed statement will suffice.

Appellant J. Kenneth Edlin was the dominating force in two Maryland savings and loan associations, First Colony Savings and Loan Association and First Continental Savings and Loan Association. Robinson was Edlin's associate and an officer in each of these associations. According to Martin Heflin, a public relations man, Edlin and Robinson consulted him in April, 1960, about the possibility of having a speech delivered in Congress in behalf of savings and loan institutions. Robinson made an initial draft of such a speech and sent it to Heflin who edited it and in-

<sup>26</sup> See section IA1, *supra*.

sented the words "Mr. Speaker" at appropriate places. Heflin, however, pointed out to Robinson and Edlin that there was no reason to make the speech at that time, and that no one "could be justified in making a speech."

The next month, May, 1960, Heflin, Edlin and Jackson Rains, an accountant for First Colony, met with Congressman Johnson in a Washington restaurant where they discussed the situation of Maryland savings and loan associations. Johnson asked Heflin to send him a resume of the meeting.

On June 30, 1960, Johnson delivered the speech on the floor of the House of Representatives. Johnson testified that the speech was prompted by an unfavorable newspaper article in the May 27, 1960, edition of the Washington Star, and by his own desire to create a political issue for the upcoming congressional election. The newspaper article, however, was a relatively minor one and appeared on an inside page. On cross-examination Johnson admitted that he never had any complaints from his constituents concerning the article or even about savings and loan associations in general, and that no constituent had requested him to make a speech. He also admitted that he made no mention of the speech either in his customary weekly newsletter to constituents or during his campaign.

Johnson also testified that his administrative assistant, Manual Buarque, wrote the speech with the aid of information supplied by Heflin. Buarque testified to the same effect. But other evidence cast grave doubt on the truthfulness of this testimony. Another version of the authorship of the speech came from Accountant Rains, who testified that immediately before or after the speech was delivered Edlin showed him a copy. Rains also testified that on July 4, 1960,

on a plane trip from Maryland to Florida, Robinson and Edlin joked about the authorship of the speech. His testimony was:

"Everyone was in good spirits. Mr. Edlin and Mr. Robinson were sitting together and they were showing the speech back and forth and saying, jokingly, or facetiously, 'How do you like the speech I wrote,' and the other one would say, 'What do you mean, you wrote it? I wrote it,' and that sort of thing."

Ten days before the speech, Robinson sent Johnson a check for \$500. Both men claimed at the trial that it was a campaign contribution, but the evidence showed that when the check was drawn Robinson's bank account was insufficient to cover the sum, and that immediately thereafter he deposited a \$300 check from First Colony. First Colony recorded the check as a legal expense.

First Continental Savings and Loan thereafter ordered 50,000 reprints of the speech, underlined in red at significant portions and used to attract depositors.

It is important to note here that as of 1959, Edlin, together with Rains and First Colony, were under indictment in the District Court of Maryland for mail fraud. Rains testified that when Edlin showed him the speech, he reassured him about the pending indictment. According to Rains, Edlin said "[Y]ou see, we have friends on the Hill—we have nothing to fear on our indictment. These people are interested in us and the injustice we have been done."

The testimony of Edlin's secretary, Mrs. Sadie Goldman, was significant. She testified that in the first week of June, 1960, (before the speech) Edlin came into the office in an unusually good mood and told her: "Well, I have made a new contact. There

is no stopping us now. The sky's the limit. We'll have a chain of banks, Sadie, we are going to be rich. Seriously, Sadie, it is a Congressman." She also testified that she later asked Robinson why Edlin was so excited. Robinson asked her if she had ever heard of Congressman Johnson, and when she said he had not, Robinson told her, "You will hear plenty about him now. He is on our payroll. It is costing Ken [Edlin] plenty."

Johnson claimed at the trial that when he made the speech he did not know that an indictment was pending against Edlin. Buarque, the Congressman's administrative assistant, testified that he was aware of the indictment but did not inform Johnson. In closing arguments, the Government maintained that in the context of the events both Johnson's and Buarque's testimony was "incredible."

In addition, Mrs. Goldman said that in July, 1960, she asked Robinson what would happen to her job if Edlin were convicted. Robinson replied, "You have nothing to worry about. The Congressmen are being paid well and Ken [Edlin] will never go to jail. Don't worry."

The evidence is uncontradicted that Congressman Johnson did receive the checks mentioned in the indictment and that when he, together with Congressman Boykin, spoke to the Attorney General and other members of the Justice Department in behalf of Edlin, he did not tell them that he was appearing as an attorney.

Both Robinson and Edlin conferred with Johnson a number of times as to the best approach to the Department. Robinson also prepared an analysis of the indictment for presentation to the Justice Department.

Louis Goldman, an attorney, testified that "Mr. Edlin from time to time would say that he had nothing to worry about the indictment. That his friends on the Hill would take care of it for him and that everything would turn out all right." In response to the question whether Edlin ever referred to costs, Goldman answered: "From time to time Mr. Edlin would say that it is costing him a lot of money and that the cost is eating him up." He also testified that on one occasion, noticing that Edlin looked worried—

"I asked him what was wrong, and at that time he told me that he was concerned with the fact that Congressman Boykin and Congressman Johnson were not getting anywheres with his indictment; that it was costing him a lot of money. When I asked him what he meant by that, he stopped for a minute, looked at me, and said, 'Forget it.' That was the end of that."

At the trial the appellants claimed that the checks listed in the indictment represented payments to Johnson for valid legal services. It was the Government's contention that to a large extent the alleged legal services were either performed by other attorneys or not performed at all. Our examination of the record leads to the conclusion that there was ample basis, both in the testimony in chief and in cross-examination of Johnson and Robinson, for the jury to believe that the appellants' explanation for the checks was false and that the money was paid to Johnson for making the speech and for using his influence in the Department of Justice.

For example, in his direct testimony Johnson related that he had performed legal services on 305 mortgages to the Cassell Land Company. His testi-

mony was that over \$1,600,000 was involved and that his job was to review the mortgages, half of which he found to be defective. To correct the defects, he testified, he and another lawyer drew up one confirmatory mortgage. On cross-examination, he said he could not remember giving this testimony on direct, but repeated that there was a confirmatory mortgage. However, it was shown that before the Montgomery County Grand Jury he swore that he redrafted each of the defective mortgages. Faced with the conflict, he admitted that the grand jury testimony was incorrect. The prosecution then confronted him with a prepared statement he had issued, to the effect that "new *indentures* had to be made to correct the mistakes [in the mortgages]." (Emphasis added). In addition to this obvious conflict, he then acknowledged on cross-examination that he did not prepare the confirmatory mortgage, but that another lawyer did.

Again, in direct testified Johnson had said in reference to a proposed loan to the Savarin Development Corporation: "I did participate in the preparation of the entire loan agreement, the mortgages." Yet he later conceded that he did not mention the loan to the grand jury and, on cross-examination, stated that Robinson actually prepared the loan papers.

Two attorneys who assertedly worked with Johnson testified that they and not Johnson performed the legal work. One, Carrico, testified that shortly before the trial Johnson visited him and asked him to sign a prepared statement concerning Johnson's legal services. Carrico refused because the proffered statement recited that Johnson had visited him to discuss a foreclosure—a statement Carrico would not confirm and his records did not reflect.

Moreover, Johnson introduced into evidence many legal documents on which he had placed penciled no-

tations. On cross-examination, however, a revealing light was shed when it was shown that Johnson had earlier given photostats of these same documents to the FBI and that the photostats were without the penciled marginal notes. Johnson had also furnished the FBI a photostat of a letter he had allegedly written to Robinson discussing the validity of a long agreement. The letter bore a Berlin, Maryland, return address, but its authenticity was impeached by the telephone company's records showing that throughout the day the letter was supposed to have been written in the town of Berlin, on the Eastern Shore of Maryland, Johnson placed long distance phone calls from his Washington office.

Robinson testified that Johnson was on a retainer, yet a statement he made to the FBI did not reflect this. On the contrary, in the FBI report, which he signed, he declared that particular checks were paid to Johnson for specific legal services. The checks, specified in the indictment, aggregating \$17,550, which the appellants now claim were for legal services, are far in excess of the \$6000 to \$7500 claimed by Robinson in his interview with the FBI agent.

This testimony is representative of much more to the same effect. If believed by the jury, as it obviously was, it is more than sufficient to support the jury's verdict.

#### IV. ALLEGED PREJUDICIAL TRIAL ERRORS

##### A. FBI AGENTS' TESTIMONY

At trial, the defense insisted that the checks specified in the indictment were payments to Johnson for legitimate legal services. Robinson and Johnson so testified. They both also testified that Johnson was on a retainer from the savings and loan associations controlled by Edlin.



To rebut this testimony, the Government called as a witness the FBI agent who had interviewed Robinson on January 11, 1962. In the course of the interview the agent made notes, then returned to his office and, from these notes, dictated a narrative statement which was subsequently typed and presented to Robinson. Robinson read, corrected and signed the statement. A copy was given to him.

The agent testified that in the interview Robinson made no mention of any retainer fee having been paid to Johnson. He also testified that after the statement was signed Robinson added that the total fees paid to Johnson were between \$6000 and \$7500. If believed by the jury it meant that the appellants' evidence that Johnson was on a retainer was probably false. The suggested inference is that if he were on a retainer, as now claimed, Robinson would have mentioned this fact to the agent. Moreover, the \$6000 to \$7500 testified to by the agent as the sum Robinson claimed to be the total legal fees, was far below that claimed by the appellants at the trial.

On cross-examination, the agent stated that after he dictated Robinson's statement he destroyed the interview notes in accordance with the then customary FBI procedure. The completed and signed statement of Robinson, which was made part of the agent's report, was retained in the FBI files. The agent further testified that while he was not aware at the time of the interview that Robinson was being investigated, he did recognize the possibility that Robinson might be called as a witness in a prosecution against Johnson. Robinson moved to strike the agent's entire testimony for the reason that the original notes of the interview had been destroyed. The court denied the motion and ruled

the evidence admissible against Robinson, though not against Edlin.

Another FBI agent testified to an interview he had with Johnson's administrative assistant, Manuel Buarque. This agent's testimony was offered in rebuttal of certain testimony given by Buarque as a defense witness. At the interview, the agent made notes from which he later prepared his report. Buarque did not sign the report. Johnson's counsel moved that the agent's testimony be stricken because of the destruction of the notes. Again the trial court denied exclusion. Buarque, like Robinson, was furnished a copy of the report.

Appellant Robinson argues that the destroyed notes were a produceable "statement" under the Jencks Act, 18 U.S.C.A. § 3500, and that their willful destruction by the FBI required the agents' testimony to be stricken.<sup>27</sup> If the notes can qualify as a "statement," a serious question arises.

This is not the first time that a court has been called upon to consider the effect of the destruction of FBI interview notes. *Campbell v. United States*, 373 U.S. 487 (1963); *Killian v. United States*, 368 U.S. 231 (1961); *Ogden v. United States*, 323 F. 2d 818, 820-21 (9th Cir. 1963); *United States v. Greco*, 298 F. 2d 247 (2d Cir. 1961). Each time the problem has arisen the FBI has claimed that the notes were de-

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<sup>27</sup> 18 U.S.C.A. § 3500(d) reads as follows:

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

troyed as part of FBI routine. This is really not a satisfactory answer. Where the agent testifies to matter he claims not to be in the notes and the defendant insists on a different version, an issue arises which may not be satisfactorily resolved in the absence of the original notes. If the notes were available, they might confirm or refute one version or the other. One of the purposes of both the *Jencks* decision and the Jencks Act is to afford the defense an opportunity to impeach witnesses. *Palermo v. United States*, 360 U.S. 343 (1959); *United States v. Wenzel*, 311 F. 2d 164, 171 (4th Cir. 1962). The destruction of interview notes does not advance this purpose. of course, a district court may find as a fact that the notes were not a substantially verbatim record, or that they were accurately copied into a report and then destroyed in good faith, but the necessity for inquiries along this line can be avoided by the preservation of notes until after the trial. Eliminating uncertainty may serve the interest of the Government no less than the defendant.

However this may be, as we view the Jencks Act, the notes in question do not qualify either as a "statement" or as a "report" as these terms are defined in the Act. Subsections (a), (b) and (c) are pertinent.

"(a) In any criminal prosecution brought by the United States, *no statement* or report in the possession of the United States which was *made by a Government witness* or prospective Government witness (other than the defendant) *to an agent of the Government* shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) *After a witness called by the United States has testified on direct examination*, the court shall, on motion of the defendant, order

the United States to produce *any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.* \* \* \*

“(e) The term ‘statement,’ \* \* \* in relation to any *witness called by the United States* means—

(1) a written *statement made by said witness* and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement *made by said witness to an agent of the Government* and recorded contemporaneously with the making of such oral statement.” (Emphasis added.)

The italicized portions require that the obtainable “statement or report in the possession of the United States” must be made *by the witness*, and the witness must be a *government witness*. By its terms, the Act does not cover statements made either by a defendant or by a defense witness.

The FBI agents’ reports were within the Jencks Act because in each instance the “report \* \* \* was made by a Government witness \* \* \* to an agent of the Government.” *Holmes v. United States*, 271 F. 2d 635 (4th Cir. 1959). Copies of these verified statements were, as heretofore shown, in the defendants’ possession. Assuming that the notes the agents made when interviewing Robinson and Buarque were “substantially verbatim recital[s] of oral statement[s],” they were at most statements of Robinson and Buarque, not statements “made by a Government witness.”

Both FBI agents testified to their present recollection of the interviews. It was for the jury to consider the reliability and weight of their testimony, as compared to the testimony given by Robinson and Buarque.

B. ALLEGED COMMENT ON EDLIN'S FAILURE TO TESTIFY

Edlin claims that the prosecutor improperly commented on his failure to take the stand. The incident referred to occurred at the end of the Government's closing summary to the jury. After pointing out asserted inconsistencies in the appellants' positions, the prosecutor spoke these words:

"Members of the Jury, the defendant Edlin has presented no defense in this case. He has presented no evidence to contradict the charges against him. He has produced no evidence to deny numerous statements made by many, many government witnesses. He has produced no evidence to deny the testimony of numerous witnesses of his various activities which clearly indicate beyond any doubt, Members of the Jury, his guilt of the charges in this indictment."

In *Davis v. United States*, 279 F. 2d 127 (4th Cir. 1960), a similar argument was presented. The answer we gave applies with equal force here:

"The United States Attorney's argument cannot be said to have constituted a forbidden comment on the failure of the defendants to testify. He merely reviewed certain testimony and added, truthfully, that there was no evidence in contradiction."

The prosecutor did not draw improper attention to Edlin's refusal to testify. He merely pointed out that the defense did not introduce evidence to con-

tradict certain of the prosecution's witnesses. Edlin was not the only person who could have refuted the Government's witnesses. *Leathers v. United States*, 250 F. 2d 159, 165 (9th Cir. 1957). The prosecutor addressed himself to the absence of anything in the record to contradict the Government's version of the case. Under these circumstances his comment was not improper. *Davis v. United States, supra*; *Garcia v. United States*, 315 F. 2d 133, 137 (5th Cir. 1963).

#### C. ALLEGED "TOTALITY OF PREJUDICE"

Edlin launches a more general attack on the trial, claiming that evidence admitted against one or more of his co-defendants constituted "in its totality" prejudice as to him. This amounts to no more than a continuation of his argument, dealt with earlier, that conspiracy cases in general often produce evidence against one defendant which may prove prejudicial to his co-defendant.

We have closely examined the numerous references to the record and find that they do not show the claimed "totality of prejudice." The record attests the close and careful attention the trial judge gave to questions of the admissibility of evidence. Wherever necessary he instructed the jury that evidence admissible only against certain-appellants should not be considered against the others. We have earlier in this opinion pointed out the dangers inherent in conspiracy trials, but as long as Congress authorizes prosecutions for conspiracy and the Supreme Court adheres to its holdings that the Constitution does not proscribe them, we must rely in large measure on the alertness of district judges to protect the interests of the individual defendants by properly cautioning the jury as to the purpose and effect of particular items

of testimony. Indeed, the problem is potentially present whenever two or more defendants are jointly tried on any charge. The District Judge showed himself sensitive to the delicacy of his function as governor of the trial, and whenever the situation called for a specific instruction to the jury, appropriate instruction was given.

Where the trial judge finds that a defendant has been unduly harmed or his trial made unfair, he should in the interest of justice grant a new trial. *United States v. Decker*, 51 F. Supp. 20, 25-26 (D. Md. 1943). Upon full consideration, we cannot say that Edlin had an unfair trial. In the particular rulings, and in the totality of the trial we perceive no unfairness.

#### D. INSTRUCTIONS TO THE JURY

Each of the appellants presses the contention that certain portions of the court's charge to the jury were erroneous. First, it is said that the court committed reversible error in refusing to instruct the jury to acquit unless they found that the alleged legal services performed by Johnson were a "sham and pretense." The court refused the tendered instruction "because there is no requirement on the Government to prove sham and pretense."

The Government did not claim, nor was it necessary for it to show, that Johnson performed absolutely no legal services. The appellants' requested instruction, if granted, was susceptible of being understood by the jury as requiring it to find a set of facts beyond that charged by the Government. The court dealt with the subject adequately and avoided the possibility of misunderstanding when it told the jury that receipt of the compensation was illegal if it was, "in whole or in



substantial part" for services rendered before the Department of Justice. This was unquestionably appropriate to direct the jury to the issue impartially. *United States v. Burton*, 202 U.S. 344 (1906).

The appellants also contend that the District Court erred in refusing their requested instruction on circumstantial evidence. This would have required the jury to disregard all circumstantial evidence unless it excluded every reasonable hypothesis except guilt. In *Holland v. United States*, 384 U.S. 121, 139-40 (1954), the Supreme Court explicitly rejected this formulation. Justice Clark, who wrote for a unanimous Court, emphasized that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect [citations omitted]." Here the court did instruct on reasonable doubt, using the formulation approved by the Supreme Court in *Holland*. Refusal of the tendered instruction was not error. *United States v. Lawrenson*, 298 F. 2d 880, 884 (4th Cir. 1960); *Milanovich v. United States*, 275 F. 2d 716, 721 (4th Cir. 1960). *rev'd on other grounds*, 365 U.S. 551 (1961).

Edlin requested an instruction to the effect that the jury could consider whether his actions were based upon the advice of counsel in determining his intent and good faith. *United States v. Painter*, 314 F. 2d 939, 943 (4th Cir. 1963). The Judge's charge incorporated the substance of the requested instruction, and refusal to adopt Edlin's very words was not error. Other requested instructions were rejected, but we find no error, because insofar as they asserted valid propositions of law they were in essence embodied in the charge.

## V. CONCLUSION

Though we find the evidence sufficient to support a guilty verdict on all counts, the invalidity of count one as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts. Many of the events testified to at the trial related only to the speech. It was introduced into evidence and its authorship, contents, motivations and accuracy made the subject of extensive inquiry. The conclusion is unavoidable that this mass of evidence and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflicts of interest counts. The judgment against Johnson is therefore vacated and the case remanded for a new trial on the counts charging violations of 18 U.S.C.A. § 281. As to Edlin and Robinson, the convictions are affirmed. *Judgment as to Johnson vacated and a new trial ordered with instructions; judgment as to Edlin and Robinson affirmed.*

## APPENDIX B

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### JUDGMENT

Filed and Entered September 16, 1964

United States Court of Appeals for the Fourth Circuit

No. 9223

UNITED STATES OF AMERICA, APPELLEE

*vs.*

THOMAS F. JOHNSON, J. KENNETH EDLIN, AND  
WILLIAM L. ROBINSON, APPELLANTS

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND*

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court as to Thomas F. Johnson appealed from, in this cause, be, and the same is hereby, vacated, and that the cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein; and that the judgments of the said District Court as to J. Kenneth Edlin and William L.

Robinson appealed from, in this cause, be, and the same are hereby, affirmed.

(S) SIMON E. SOBELOFF,  
*Chief Judge, Fourth Circuit.*

(S) CLEMONT F. HAYNSWORTH, JR.,  
*United States Circuit Judge.*

(S) JOHN D. BUTZNER, JR.,  
*United States District Judge.*

FILE

DEC 17

JOHN F. DAVIS

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1964

No. [REDACTED] 25

UNITED STATES OF AMERICA, *Petitioner,*

v.

THOMAS F. JOHNSON.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF FOR THOMAS F. JOHNSON IN OPPOSITION**

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1964

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**No. 695**

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UNITED STATES OF AMERICA, *Petitioner*,

v.

THOMAS F. JOHNSON.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

**BRIEF FOR THOMAS F. JOHNSON IN OPPOSITION**

---

**Opinions Below**

The Opinion of the Court of Appeals (Pet. App. 12-22) is reported at 337 F. 2d 180. The Opinion of the District Court is reported at 215 F. Supp. 300.

**Jurisdiction**

The judgment of the Court of Appeals was entered on September 16, 1964. On October 19, 1964, the Chief Justice extended the time for filing a Petition for a Writ of Certiorari to and including November 15, 1964. The Petition for a Writ of Certiorari was filed on November 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



### Question Presented

Whether the provision of Article I, Sec. 6 of the Constitution that speech or debate in the Congress shall not be questioned elsewhere permits the government to make a criminal charge that a member of Congress collaborated with others in the preparation of a speech in the House of Representatives, made the speech there for their benefit and received a gift for doing so.

The constitutional question presented by the evidence at the trial was this: Does the Speech and Debate Clause permit the government to contend that a member of Congress was motivated, or influenced in whole or in part, in making a speech in the House of Representatives by a contribution made shortly before the speech to his political campaign for re-election.<sup>1</sup>

<sup>1</sup> If the Writ is granted, Respondent wishes to reserve the right to argue certain important questions which were raised below but were not decided in favor of Respondent. If any one of them is determined favorably to Respondent, the reversal by the Court of Appeals of Respondent's conviction would be sustained. These questions are: (1) whether, in enacting the 1866 Conspiracy Statute (18 U.S.C. Sec. 371), Congress intended that it should apply to a charge of conspiracy with respect to the making of a speech in the House of Representatives for a gratuity, (2) whether the conspiracy charge was fatally defective because (a) its alleged unlawful objects were so vague, indefinite and all pervasive they did not inform Respondent of the nature of the accusation in conformity with the Sixth Amendment and the Due Process Clause of the Constitution and (b) it did not allege any false statement or misrepresentation, (3) whether the F.B.I. may continue its procedure to circumvent the Jencks Act by destroying original witness-interview notes made by an F.B.I. agent, i.e., whether such notes should be deemed a "statement" or "report" under the Jencks Act, (4) whether in a criminal case the government may breach the seal of secrecy of grand jury testimony by permitting its own witness or witnesses to read grand jury testimony without entitling a defendant to access to the transcript of all grand jury testimony, (5) whether the instruction of the District Judge to the jury as to criminal intent with respect to the substantive counts was so inadequate Respondent's rights were not protected and (6) whether vilification of Respondent by government counsel in summation to the jury violated the teaching of this Court in *Berger v. United States*, 295 U.S. 78, 88.

### **Constitutional and Statutory Provisions Involved**

Article I, Section 6 of the United States Constitution provides in part:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

18 U.S.C. 371, provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. 281, which was repealed after the alleged commission of the acts involved in this case, provided in part:

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

### Statement

The Statement of the government in its Petition requires amplification.

An object of the Count I conspiracy charge was alleged to be the deprivation of the right of the government to the faithful services of Respondent as a member of the House of Representatives, "uninfluenced" by payments of money by other defendants, "in relation to matters pending in the House of Representatives" and "before the Department of Justice" (R. App. 5).<sup>2</sup> At the trial there was no evidence that the speech of Respondent made in the House of Representatives on June 30, 1960, had any relationship to any pending bill or other matter pending in the House or to any matter before the Department of Justice.<sup>3</sup>

At the trial almost all of the important testimony with respect to events in the year 1960 related to the speech of Respondent. We estimate that over 60% of all testimony with respect to Respondent involved an inquisition into the motives and purposes of the speech, its authorship, content, and relationship, if any, to a check in the amount of \$500.00 dated June 20, 1960, sent by Robinson to Respondent.

It was undisputed that Edlin and Robinson, who were associated with two Maryland Savings and Loan Associations one of which (First Colony) was located at Elkton in the Congressional District of Respondent, hoped that a member of Congress might deliver a speech defending state savings and loan institutions from attacks made upon them by the federal savings and loan association (R. App.

<sup>2</sup> "R. App." refers to Respondent's Appendix in the Court of Appeals.

<sup>3</sup> The visits of Respondent to Justice, the basis of the substantive counts of the indictment, did not occur until after March 15, 1961.

182-184). Edlin told Respondent in May, 1960, of these allegedly unjustified attacks (R. App. 186, 197). On May 27, 1960, Respondent was shown a copy of a newspaper article in the Washington Evening Star of May 27, 1960, characterizing all Maryland state savings and loan associations as "phonies", as evidence of the mistreatment of the independent savings and loan associations (R. App. 186). Heflin, a government witness who was a public relations man for a small Institute of Independent Savings and Loan Association, testified that he told Respondent it "was categorically unfair. I still think so" (R. App. 189, 201). Respondent turned Heflin over to his Administrative Assistant and Heflin supplied him with some facts and figures for a draft of the speech. Both Heflin and the Administrative Assistant testified that it was prepared by the latter (R. App. 189, 190, 200, 277, 479).

The speech in the House of Representatives criticized the article in the Evening Star and defended Maryland state savings and loan associations from the attack made upon them in that article. The speech contained no reference to First Continental Savings and Loan Association or First Colony Savings and Loan Association, with which other defendants were associated, or to any other named association (R. App. 931).

The letter of Robinson to Johnson enclosing the \$500.00 check of June 20, 1960, made clear that it was a contribution to Johnson's 1960 political campaign for re-election (R. App. 565). The check was endorsed by Johnson to his campaign treasurer, was deposited in the account of the treasurer and was used as, in the case of other campaign contributions, for advertising, radio, television, etc., in support of the 1960 candidacies of John F. Kennedy, Lyndon Johnson and Respondent (R. App. 246-252, 567). The contribution was

listed in the official report of the treasurer filed within 30 days of the November 1960 election. Although Robinson was reimbursed for his check by First Continental Savings and Loan Association, there was no evidence contradicting the testimony of Respondent and Robinson that Robinson had not told Respondent he had been reimbursed for his campaign contribution (R. App. 752).

No one testified in this case that there was an understanding, if Respondent would make the speech, he would receive this campaign contribution or that he had agreed to make the speech for the campaign contribution. Respondent and Robinson each testified to the contrary (R. App. 570, 751, 752, 783).

In holding that there was sufficient evidence for the jury that the \$500.00 check of Robinson represented compensation for the speech, the Court of Appeals relied heavily upon jesting statements attributed to Edlin and Robinson, out of the presence of Respondent, each claiming authorship of the speech (Pet. App. A. p. 44). The Court overlooked the fact that these hearsay statements were *not* admitted against Respondent (Tr. 421, 422). The Court of Appeals also relied upon other hearsay statements attributed to Robinson and Edlin out of the presence of Respondent, stating, or intimating, that Respondent was on their payroll (Pet. App. A. pp. 44-45). These statements were not admissible against Respondent under any known legal theory. In a conspiracy case an exception to the hearsay rule is only made when the statement is in furtherance of the object of the conspiracy *and* it has first been shown, by independent evidence, that the defendants combined together in a common enterprise. These statements out of the presence of Respondent were not made in furtherance of any future object and there was no independent

evidence that he combined with others in a common enterprise.

Government counsel argued to the jury that Respondent must have been motivated or influenced by the \$500.00 political campaign contribution in deciding to make the speech in the House of Representatives (Tr. 5819-5830, 6200-6205) and on appeal in the Court of Appeals the brief for the government asserted "the government certainly did not have to prove that the Congressman's *sole* motive in giving the speech was to receive compensation or to aid Edlin or Robinson . . ." (Govt. Brief p. 42). Thus it was the position of the government that, under this amorphous conspiracy charge, it was not necessary for the government to establish that Respondent was employed, or even consciously agreed, to make his speech for the campaign contribution; all that was necessary was for the testimony to indicate that Respondent may have been influenced by the campaign contribution made 10 days before the speech or by a wish to aid Edlin or Robinson. If a jury could be permitted to speculate whether the gift of a campaign contribution may have influenced a senator or a representative in making a speech in the Congress, members of the legislative branch of the government would be placed at the mercy of the executive power.

#### Reasons for Denying the Writ

The unanimous opinion of the Fourth Circuit holding unconstitutional the Count of the indictment, charging that Respondent, a member of Congress, conspired to defraud the United States by collaborating with others in the preparation of a speech and making the speech in the House of Representatives for a gift followed the opinions of this Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951) and *Kilbourn v. Thompson*, 103 U.S. 168 (1881). The Fourth

Circuit decision is not in conflict with that of any other Circuit nor is it in conflict with any opinion of this Court. Indeed, there is no decision anywhere in the United States or in England at variance with the opinion of the Court of Appeals.

Nor has the Court of Appeals decided an important question of federal law which has not been settled. The question presented was of great general importance in English Constitutional history until 1689 when it was then settled in England by the Bill of Rights. The question was of importance in the United States in 1789; it was then settled by the plain, unambiguous, unqualified, definitive declaration of Article I, Section 6 that speech in the Congress "shall not be questioned" elsewhere. If there could be any doubt as to the meaning of the constitutional prohibition, designed to secure legislative freedom, it was authoritatively determined by this Court in *Kilbourn* and again in *Tenney*.

1. Since the Bill of Rights of 1689 when the principle of legislative liberty was first established, the Courts of England have consistently held that no criminal or civil charge may be maintained in the Courts against a member of Parliament with respect to speech or debate there and the House of Commons and the House of Lords alone can hear, convict and impose sanctions with respect to alleged improper or criminal speech and debate.<sup>4</sup>

2. In America even before the Federal Constitution, the privilege as to legislative freedom of speech was deemed so essential that it was embodied in the Articles of Con-

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<sup>4</sup> *Ex parte Wason*, 4 Q.B. 573 (1869); Lord Denman in *Stockdale v. Hansard*, 9 Ad. & E. 1, 113: "whatever is done within the walls of either assembly must pass without question in any other place." Lord Chief Justice Coleridge in *Bradlaugh v. Gossett*, 12 Q.B.D. 271, 275: "what is said or done within the walls of Parliament cannot be inquired into in any court of law."



federation of 1777; in the Maryland Declaration of Rights of 1776; in the Constitution of the State of Massachusetts in 1780; and in the Constitution of New Hampshire in 1784. At the Federal Constitutional Convention the pertinent clause of Article I, Section 6 was adopted without opposition. The significance accorded the clause is best indicated by the comment of Mr. Justice Story in his *Commentaries on the Constitution* (p. 630):

The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belong to the legislation of every State in the Union as matter of constitutional right.

Since the Constitution of almost every state of the Union contains a provision comparable to the Speech and Debate Clause of Article I, Section 6, no state court has entertained such a charge as that involved here.

3. Whether Article I, Section 6 should be narrowly interpreted to insure that it does not protect alleged criminal conduct with respect to speech or debate in the Congress, as the Petition contends, is not unsettled. This constitutional privilege has been universally interpreted liberally to achieve its fundamental purpose and no American or English Court has ever attempted to qualify, condition or limit its full constitutional scope. This Court unanimously and authoritatively determined in *Kilbourn* and in *Tenney* that this clause of Article I, Section 6 must be liberally interpreted.

4. The Petition asserts that the criminal charge in this case did not "question" the speech of Respondent in the

House of Representatives but his antecedent conduct in allegedly agreeing to accept a gratuity for the speech (Pet. pp. 7, 8). This contention does not present an undetermined question because it necessarily implies that it is constitutionally permissible for the government to impeach the motivation of speech in the Congress. The motivation of a speech is so closely related to its content, they are of course inseparable because no words are spoken or written without purpose. In *Tenney*, decided as recently as 1951, this Court rejected this very contention of the government that the constitutional prohibition of Article I, Section 6 did not apply to official acts of members of the legislative branch when the government charged an unworthy, dishonest, corrupt, or criminal purpose. The Court pointed out that the constitutional principle would be of little value if the elected representatives of the people could be subjected to the burden of a trial or to the hazards of a jury's speculations as to motive.

The Petition postulates a theoretical situation in which a member of Congress agrees to make a venal speech but does not make it and suggests that in that situation no speech would be impeached (Pet. p. 8). This may or may not be so but in this case the government did impeach a speech made in the House of Representatives in a clear and definitive way and, if the Speech and Debate Clause did not bar such a criminal charge, the Clause would be sterilized from any value or significance.

5. The notion of the Petition that judicial privilege involves an "analogous area" (Pet. p. 8, 10) is not correct. There is no analogy between legislative and judicial privilege because Article I, Section 6 establishes the House and the Senate as the exclusive tribunals to hear, convict and impose sanctions with respect to alleged improper or criminal speech and debate in the Congress.

6. The asserted apprehension of the government that the effect of the decision of the Court of Appeals casts doubt upon the validity of the anti-bribery statutes (Pet. p. 7) is without substance. It was not the decision of the Fourth Circuit which casts doubt upon the validity of these statutes but the decisions of this Court in *Kilbourn* and in *Tenney* that the speech and debate provision must be deemed to apply not only to speech and debate in the legislative branch of government but to all official acts of its members.

The federal bribery statutes make it an offense for one to give to a member of Congress, and for a member of Congress to accept, a bribe to influence "his act, vote or decision" "on any question, matter, cause or proceeding which may at any time be pending in either House" (18 U.S.C. 204; 18 U.S.C. 205). The government did not charge Respondent with violating either of these statutes or with conspiring to do so. Since this case concerns the entirely different charge of conspiracy to defraud the United States in violation of 18 U.S.C. Sec. 371, if the Writ were granted, this Court would have no opportunity to determine the validity of the anti-bribery statutes. Any consideration by the Court of their validity would violate the Court's most frequently repeated canons of constitutional decision. A constitutional question is not decided when it is not necessary for the Court to do so; the Court will not permit a litigant, who is unable to show an interest in the outcome, to raise the question and the Court will not decide a constitutional question which upon the facts is not presented for decision.

The government could not have charged Respondent with violating the federal bribery statutes, or conspiring to do so, because by their terms they are limited to *official* action, vote or decision with respect to *pending* matters.

The speech which Respondent made in the House of Representatives consisted of brief personal remarks unrelated to pending legislation or to any other matter in the House. His remarks expressed his personal view that an article in the Washington Evening Star disparaging all Maryland State savings and loan associations was unjust and unfair. They could not be deemed a vote, decision or any other official act pertinent to the business of the House. Indeed, his remarks were as unofficial as if contained in a speech made in Baltimore.

7. Although this Court conclusively determined the issue in *Kilbourn* and *Tenney*, the Petition asks the Court to do so again "so that Congress may establish such machinery as is appropriate to deal with such matters" (Pet. p. 7). Congress needs no instruction as to its exclusive authority in the limited area of speech and debate for it has zealously guarded it by excluding speech and debate from the anti-bribery statutes. As recently as 1954 the Senate appointed a special committee to hear charges of improper speech and conduct against a Senator of Wisconsin. The Senate voted to sustain findings of the committee and publicly humiliated and disgraced the Senator by censoring him.

8. The Petition claims that a criminal charge against a member of Congress with respect to speech and debate would not interfere with legislative independence (Pet. p. 9), and that a judicial tribunal is a better forum for determining guilt or innocence than a legislative tribunal (Pet. p. 10). These assertions of the government suggest that the constitutional prohibition embodies an unwise, unsound public policy. The argument is one that would have been appropriate in the Constitutional Convention of 1789;

it was foreclosed by Article I, Section 6 and has been repudiated by this Court in *Kilbourn* and later in *Tenney*.

9. The Petition is forced to rely upon remote provincial cases which have little relationship with that at bar (Pet. p. 10). *Rex v. Boston*, 33 C.L.R. 386 (N.S.W.) (1923) charged a conspiracy by a member of a legislative assembly of New South Wales, Australia, and others to wrongfully induce the Province to acquire certain private property. Speech or debate of the legislative member was not involved. In *Regina v. White*, 13 S.C.R. (N.S.W.) 322 (1875) one was charged with offering a bribe to a member of the Legislative Assembly of New South Wales for his vote for a pending bill. The issue of Parliamentary privilege was not raised. Justice Faucett of the Supreme Court of New South Wales was so unaware of the Speech and Debate clause of the Bill of Rights that, in holding an offer to bribe a legislator was a criminal offense, he relied upon the fact that members of the House of Commons had been convicted by the House and expelled for accepting bribes.

In *Regina v. Bunting, et al.*, 7 O.R. 524 (Ontario, 1885) (G.A. App. 29-57) certain members of the provincial assembly were charged with conspiring to vote for certain bills in consideration of bribes. The Court held this was a criminal offense cognizable by the Court. Although no speech was involved, as here, Justice O'Connor wrote a vigorous dissent (G.A. pp. 46-57) concluding that the psychological state of mind of legislative members, their opinions and motives, could not be inquired into; and interference by the Courts would be an invasion of the independence of the legislative body and its members to the detriment of public liberty.

**Conclusion**

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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December, 1964

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**In the Supreme Court of the United States**

OCTOBER TERM, 1965

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No. 25

UNITED STATES OF AMERICA, PETITIONER

*v.*

THOMAS F. JOHNSON

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

BRIEF FOR THE UNITED STATES

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**OPINIONS BELOW**

The opinion of the court of appeals is reported at 337 F. 2d 180. The opinion of the district court is reported at 215 F. Supp. 300.

**JURISDICTION**

The judgment of the court of appeals was entered on September 16, 1964. On October 19, 1964, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 15,

1964 (a Sunday). The petition was filed on November 16, 1964, and was granted on January 25, 1965 (379 U.S. 988). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the Constitution, particularly Article I, Section 6, providing that "for any Speech or Debate in either House," no member of Congress shall "be questioned in any other Place," bars criminal prosecution of a Congressman for accepting a bribe to make a speech in Congress.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, of the United States Constitution provides in part:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

18 U.S.C. 281, which was superseded by more comprehensive legislation subsequent to the commission of the acts involved in this case, provided in pertinent part:

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U.S.C. 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

#### STATEMENT

On April 1, 1963, an eight-count indictment was returned in the United States District Court for the District of Maryland charging in count one that respondent and Frank W. Boykin, then Congressmen, conspired with two others between April 1, 1960, and

December 31, 1961, to defraud the United States of its right to have the Congressmen's duties performed free from corruption and uninfluenced by payments of money and to have the business of the Department of Justice conducted impartially. It was charged that, as part of the conspiracy, both Congressmen were paid by the other defendants to try to persuade the Department of Justice to postpone the trial of, and ultimately dismiss, mail fraud charges pending against persons connected with the First Colony Savings and Loan Association and that respondent was paid to make a speech in Congress defending the operation of independent savings and loan associations (App. 1-19).<sup>1</sup> The seven other counts (App. 19-30) charged that respondent, aided by the other defendants, was paid to intercede with Justice Department officials to persuade them to postpone the mail fraud trial and dismiss the pending indictment, in violation of the conflict-of-interest statute then in effect, 18 U.S.C. 281 (see *supra*, pp. 2-3). Respondent's motion to dismiss the indictment on various grounds, including the contention that count one was barred by the speech or debate privilege of Article I, Section 6 (*supra* p. 2), was denied by the trial court (App. 48, 52-56). After a trial by jury, all defendants were convicted on all counts (App. 42-43). Respondent was sentenced to imprisonment for a concurrent period of six months on each count and was fined \$5000 on the conspiracy count (App. 44-45).

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<sup>1</sup> "App." refers to the appellants' appendix in the court below, filed as Volumes 1 and 2 of the record in this Court. "R." refers to Volume 3 of the record filed in this Court. "Tr." refers to the Trial Transcript.



In pertinent part, the government's evidence showed that, in 1960 and 1961, defendant J. Kenneth Edlin, the dominant figure in two Maryland savings and loan institutions (First Colony and First Continental), was under indictment for mail fraud in connection with activities of First Colony (App. 205-206, 265-266). In April 1960, Edlin and an associate, defendant William L. Robinson, consulted with Martin Heflin, a public relations counselor, on the desirability of having a speech delivered in Congress on behalf of independent savings and loan associations (App. 180-184). After a meeting with respondent in May, Heflin and Robinson supplied material for a proposed speech to respondent's administrative assistant (App. 189-190; cf. R. 4-5). In the first week in June, Edlin told his secretary that he had a Congressman as a "new contact," as a result of which, "we are going to be rich" (App. 161). At about the same time, Robinson informed Edlin's secretary that Congressman Johnson was "on our pay roll" (App. 162). On June 20, 1960, Robinson sent respondent a check for \$500 (App. 250-251, 564-565). Ten days later, respondent delivered a speech in Congress defending independent savings and loan associations (App. 931-937).<sup>2</sup> Either immediately before or immediately

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<sup>2</sup> The only official copy of the speech, contained in the Congressional Record, that was introduced at the trial was placed in evidence by respondent (App. 470). Earlier in the trial, the government had introduced, without objection, one of the reprints paid for by First Continental, for the purpose of showing that parts of the text were underscored for use in encouraging prospective depositors (App. 258-260).

after the speech was made, Edlin displayed a copy of its text, commenting that there was no reason to fear the mail fraud indictment since "we have friends on the Hill" (R. 4). The only reprints made of the speech were purchased by First Continental and were used to induce prospective savers to deposit money in Edlin's savings and loan associations (App. 205-206, 257-264; R. 11-12).

Between August 1960 and March 1961, respondent received \$3700 in checks from Robinson (Tr. 197-199, 716-728, 957-958). Between March and October 1961, respondent and Congressman Boykin visited officials of the Department of Justice to discuss the mail fraud charges pending against Edlin in an effort to convince the Department that the indictment should be dismissed (App. 356-358, 366-389, 837-846). During this period, respondent received over \$19,000 from Robinson and First Continental (R. 5-11, 15-22).

In his defense, respondent testified that he delivered the speech in response to a newspaper article and in order to create an issue for a forthcoming congressional campaign (App. 567-569). He said that the \$500 check he received in June 1960 was a campaign contribution (App. 565-569; R. 84-85) and that the other payments were for the performance of various legal services (App. 575-747; R. 93-193).

The court of appeals found "the evidence sufficient to support a guilty verdict on all counts" (R. 326). Nevertheless, it reversed respondent's conviction on count one on the ground that the speech or debate clause of Article I, Section 6 bars a criminal prosecution of a Congressman for accepting money to make

a speech in Congress. The court deemed this interpretation necessary in order "to promote the independence of all congressmen" and "[t]o avoid restraint on free expression on the floor of either House" (R. 304). It ruled in this connection "that whenever the motivation for making a speech is called into question, the privilege applies," and "that the Constitution has clothed the House of which [respondent] is a member with the sole authority to try him" (R. 299, 303). In reaching this conclusion the court of appeals (R. 301) agreed with the district court (App. 56) that, for the purpose of determining the applicability of Article I, Section 6, there is no significant difference between a charge under the conflict-of-interest law that a Congressman accepted a bribe to make a speech and a charge, as here, that a Congressman made a speech for money as part of a conspiracy to defraud the United States of its governmental functions in violation of 18 U.S.C. 371 (*supra* p. 3).

The court vacated respondent's conviction on the substantive counts and remanded for a new trial on the ground that evidence relating to the speech prejudiced his trial on these counts. The convictions of the other defendants were affirmed.

## ARGUMENT

### INTRODUCTION AND SUMMARY

More than one hundred and ten years ago, Congress made it a crime for a member of Congress to accept a bribe to influence his vote or decision on any matter pending before him in his official capacity. Although it was understood that the speech or de-

bate clause protected voting and other official conduct, no member of Congress, either then or at the time of later similar enactments, evinced concern that the enforcement of such legislation would impinge upon the freedom of legislative speech and debate. Yet the court below reversed respondent's conviction on the supposition that his prosecution for taking a bribe in exchange for an official act would have an inhibiting effect on freedom of speech in Congress.

In our view, the court below, not Congress, misconstrued the constitutional provision. The scope of the speech or debate clause is dictated by its purpose—to promote a free legislative process by relieving Congressmen of apprehension over civil or criminal liability arising out of the performance of their public duties. While this purpose requires the immunization of legislators from liability founded upon the content of their official speech, it does not justify immunity from prosecution for the antecedent unlawful act of taking a bribe to make a speech in Congress—an act which is an offense whether or not the speech is ever given. This critical distinction between liability based on the content of legislative speech and liability based on accepting a bribe is borne out by decisions in the analogous area of judicial privilege and is sustained by analysis of the historical background of the speech or debate clause itself. Not only is the expansive immunity granted by the decision of the court below unnecessary to satisfy the purpose and history of that constitutional provision; it is opposed to the basic concept of responsive rep-

representative government. The Constitution does not require that only the House of which a faithless legislator is a member may punish him for taking a bribe in connection with his official duties. As we have noted, Congress itself has never doubted that it could make that act a crime, triable in the courts, subject to all the constitutional safeguards which surround a jury trial.

# I.

THE SPEECH OR DEBATE CLAUSE DOES NOT RENDER CONGRESS IMPOTENT TO PROVIDE FOR JUDICIAL SANCTIONS AGAINST A CONGRESSMAN WHO ACCEPTS A BRIBE IN EXCHANGE FOR A LEGISLATIVE SPEECH

A. THE RATIONALE OF THE SPEECH OR DEBATE CLAUSE BARS LIABILITY FOUNDED ON THE CONTENT OF A LEGISLATIVE SPEECH BUT DOES NOT BAR LIABILITY BASED ON AN ANTECEDENT CORRUPT AGREEMENT.

1. The speech or debate clause is aimed at promoting an independent Congress, uninhibited from taking action deemed to be in the public interest. To that end, it provides assurance to a representative that no civil or criminal liability can be founded upon his official speech or action. In so doing, it permits the unscrupulous Congressman "to vent his spleen upon others" with impunity because "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F. 2d 579, 581 (C.A. 2) (L. Hand, setting forth the rationale of the executive privilege); see *Cochran v. Couzens*,

42 F. 2d 783, 784 (C.A.D.C.), certiorari denied, 282 U.S. 874 (applying such rationale to the legislative privilege).

This rationale is applicable in suits based upon the *content* of a legislator's speech or action, where immunity is necessary to prevent impediments to the free discharge of his public duties. But it does not justify granting him immunity from prosecution for accepting or agreeing to accept money to make a speech in Congress. The latter case poses no threat which could reasonably cause a Congressman to restrain himself in his official speech, because no speech, as such, is being questioned. It is only the *antecedent conduct* of accepting or agreeing to accept the bribe which is attacked in such a prosecution. "Whether the party taking the bribe lives up to his corrupt promise or not is immaterial. The agreement is the essence of the offense; when that is consummated, the offense is complete." 3 Wharton, *Criminal Law and Procedure*, § 1383 (Anderson ed. 1957); see also *United States v. Hood*, 343 U.S. 148, 151.<sup>3</sup> Precisely the same concept underlies a conspiracy charge. It is settled that "conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated." *Williamson v. United States*, 207 U.S. 425, 447; *United States v. Rabinowich*, 238 U.S. 78, 85-86; *Goldman v. United States*, 245 U.S.

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<sup>3</sup> The proscription of 18 U.S.C. 201(c) is directed against any public official who, in exchange for the performance of an official act, "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value \* \* \*."

474, 476-477. Thus, if respondent, after accepting the bribe, had failed to carry out his bargain, he could still be prosecuted for the same offense charged here, but it could not be argued that any speech was being "questioned" in his prosecution. The fact that respondent fulfilled his bargain and delivered the corrupt speech should not render the entire course of conduct constitutionally protected.

2. The critical distinction between a prosecution based on the *content* of an official speech and one founded on the *antecedent unlawful conduct* of accepting or agreeing to accept a bribe to make the speech, overlooked by the court below, is well recognized in the case of other established privileges. It is settled that a judge cannot be held liable for the content of any judicial opinion. See *Randall v. Brigham*, 7 Wall. 523, 536-539; *Bradley v. Fisher*, 13 Wall. 335, 347-350; *Alzua v. Johnson*, 231 U.S. 106, 111. But it has never been thought that he is immune from prosecution for accepting a bribe in connection with his official duties. Notwithstanding the Constitution's provision for impeachment of judges guilty of misconduct, the first Congress, many of whose members were closely identified with the drafting of the Constitution, enacted a statute providing criminal sanctions against judges who take bribes in exchange for an "opinion, judgment or decree." Act of April 30, 1790, Sec. 21, 1 Stat. 112, 117.

The principle which controls this case was applied in *Braatlien v. United States*, 147 F. 2d 888 (C.A. 8), where a "Conciliation Commissioner" appointed under the Frazier-Lemke Act of 1940 was charged



as a member of a conspiracy to defraud the United States by the corrupt administration of that Act. Rejecting Braatelian's contention that, under the judicial privilege, he was not subject to punishment for criminal acts performed by him in his judicial capacity as a Commissioner, the court stated (147 F. 2d at 895) :

It is true that as a general rule a judge can not be held criminally liable for erroneous judicial acts done in good faith. \* \* \* But he may be held criminally responsible when he acts fraudulently or corruptly. Judicial title does not render its holder immune to crime even when committed behind the shield of judicial office. *The sufficient answer to this defense is that Braatelian was not indicted for an erroneous or wrongful judicial act. He is charged with conspiracy to defraud the United States by corruptly administering or procuring the corrupt administration of an Act of Congress. The crime charged is distinct from his official acts. It might have been consummated without the performance of a single judicial act on his part. The crime was complete when the unlawful agreement was made and an overt act was consummated by anyone of the conspirators, even though such overt act be not one laid in the indictment. [Emphasis added.]*

See also *United States v. Manton*, 107 F. 2d 834 (C.A. 2).

In the prosecution of a judge for taking a bribe in exchange for a judicial decision, as in that of a member of Congress for taking a bribe in exchange

for his official vote or speech, the corrupt official act may be evidence of the offense, but the act as such is not being "questioned" as it would be, for example, in an action for libel. In a suit for libel, giving the speech or rendering the judicial decision would itself constitute the alleged offense, while in a bribery prosecution, the offense is discrete from the speech or the decision.\*

3. In applying the constitutional provision designed to promote legislative independence, the judgment of Congress that criminal prosecution for bribe-taking in connection with official duties does not restrain legislative freedom is entitled to great weight. Congress was certainly aware of its privilege of free speech and was undoubtedly aware that the privilege encompassed not only debate but voting and other official conduct. Yet Congress has consistently proscribed bribe-taking in connection with such conduct without evidencing the slightest qualm that punishment of the corrupt antecedent act would hamper the legislative process. In 1853 it enacted a statute making it a crime for a member of Congress to accept a bribe "to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the

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\* Similarly, the privilege recognized in *Barr v. Matteo*, 360 U.S. 564, could not conceivably extend to prevent the trial of government officials for taking money to perform acts which are within the scope of their authority. Under the reasoning of the court below, such officials could never be prosecuted for bribery without violating the privilege since a bribery prosecution would "question" the motives behind the official act.

United States, be brought before him in his official capacity \* \* \*." 10 Stat. 170, 171. During the debates resulting in the adoption of this Act, no claim was made by any legislator that this Act would impinge upon or impede his right of uninhibited freedom of speech.<sup>5</sup> See the opinion of the district court, App. 54.

As recently as 1962, in a comprehensive revision of the bribery, graft and conflict-of-interest laws, Congress included its own members in the definition of "public officials" whose delinquencies are judicially punishable. Act of October 23, 1962, 76 Stat. 1119, 18 U.S.C. 201. Once again, there was no suggestion in any of the debates that such legislation might in any way restrict the freedom of congressional speech or action.

4. The test used by the court of appeals—that the privilege applies "whenever the motivation for making a speech is called into question" (R. 299)—is too sweeping a formulation and is not properly tailored to the purposes of the speech or debate clause. Contrary to the opinion below, nothing in *Kilbourn v. Thompson*, 103 U.S. 168, or *Tenney v. Brandhove*, 341 U.S. 367, requires so broad a standard. In *Kilbourn* this Court ruled, *inter alia*, that a Congressman who sponsors and votes for a resolution calling for the arrest of one allegedly in contempt of Congress is immune from a civil suit for malicious prose-

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<sup>5</sup> The Senate debate on the 1862 statute, 12 Stat. 577, indicates the strength of congressional conviction that bribetaking in exchange for official acts should be judicially punishable even though the content of those acts is itself privileged. 40 Cong. Globe 3260-3261.

cution. And *Tenney* held that, in providing civil remedies against persons who, under color of law, deprive individuals of their constitutional rights, Congress could not have intended to authorize suits against legislators for injuries arising from their official conduct. Both cases may be cited for the proposition that, where the speech and debate privilege is otherwise applicable, its protection may not be withheld on the ground that the offensive official act was improperly motivated. But neither case extends the privilege to include prosecutions not founded upon official conduct.

That the two cases relied upon by the court below do not support its ruling is underscored by consideration of *Coffin v. Coffin*, 4 Mass. 1, which this Court cited in *Kilbourn* as "perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies." 103 U.S. at 204. *Coffin* involved a civil suit for slander against a member of the Massachusetts House of Representatives for a statement made by him to a fellow legislator in a "passage-way" of the legislative assembly, while unrelated business of the House was going on. On these facts, the court held that the privilege did not apply, because the allegedly slanderous remarks were not made while the defendant "was in the discharge of any official duty" (4 Mass. at 29). As the court pointed out, "when a representative pleads his privilege, to entitle himself to it, it must appear that some language or conduct of his, in the character of a representative, is the

foundation of the prosecution, for in no other character can he claim the privilege" (*id.* at 30).<sup>6</sup>

The error of the court below was perhaps prompted by its misconception of the role of respondent's speech in his trial. The court's observation that "one-half of the testimony introduced at the trial related to the speech" (R. 302) is both inaccurate and insufficiently refined. Only a very small portion of the testimony in the government's case-in-chief (roughly 50 pages of over 2200 pages in the trial transcript) "related" to the speech in any way. And none of that testimony concerned the content or giving of the speech. Rather it dealt with the plans of Edlin, Robinson and Heflin to have such a talk given in Congress (App. 180-184), their drafting and editing of the speech (App. 189-190; R. 4-5), their meetings with respondent and his administrative assistant (App. 189-190), Robinson's and Edlin's comments concerning the speech and how it would benefit them (App. 161-163; R. 4-5), and the use of the reprints of the speech purchased by First Continental (App. 205-206, 257-264; R. 11-12). The court of appeals' own summary of the evidence (R. 315-317) shows that, except for respond-

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<sup>6</sup> The court also said in this connection (4 Mass. at 30): "But to consider every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege farther than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny—an effect which never has been, and, I confidently trust, never will be, endured by any House of Representatives of *Massachusetts*" (emphasis in original).

ent's testimony in his defense,<sup>7</sup> the evidence "relating" to the speech did not focus on the giving of the speech as such but rather on the unlawful antecedent conduct of which the speech was one end product.

We, of course, readily acknowledge that the offense arising from the bribe must be fully proved and that it may not be inferred from the mere fact that the legislator has made a speech favorable to particular interests. In this case, however, the evidence of respondent's guilt, which involved matters wholly extraneous to the speech in Congress, was "more than sufficient to support the jury's verdict" (opinion of the court of appeals, R. 320). Where, as here, the government clearly proved its case independent of the speech or inferences therefrom, no purpose of Article I, Section 6 warrants a reversal.

5. The "practical reason" relied on by the court of appeals (R. 304)—that a "groundless charge [of bribery] may be sufficient to destroy [a member of Congress] at the polls" and that "the process of indictment by a grand jury and inquiry in a court may itself be so devastating that an innocent congressman may well fear it"—argues too much. Since a "groundless charge" of corruption with respect to any official act of a Congressman "may be sufficient to destroy him at the polls," the court's reasoning would require that no bribery statute could ever be invoked against

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<sup>7</sup> As we have noted (n. 2, *supra*) the official copy of respondent's speech was placed in evidence by respondent himself.

any member of Congress.\* This, of course, is not the law. See, *e.g.*, *Burton v. United States*, 202 U.S. 344; *May v. United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830. Moreover, if an unscrupulous prosecutor were out "to get" a particular member of Congress, he could secure indictments on "groundless charges" of tax evasion or other crimes unrelated to his official duties; but such a possibility has never warranted the adoption of a rule of absolute immunity from criminal prosecution. In short, the court of appeals has applied a rule which does not fit this case. It is one thing to say that free and uninhibited legislative debate is such an important right of the people that, in order to prevent its erosion, protection is given the subject matter of any speech in Congress, no matter how unworthy its purpose, by immunizing a legislator from civil suit or criminal prosecution for delivering it. See *Tenney v. Brandhove*, 341 U.S. 367, 377. It is an entirely different matter to immunize a Congressman, as was done here, from prosecution for a corrupt agreement which would have been actionable whether he made the speech or not.

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\* 18 U.S.C. 201 (c) prohibits a Congressman from accepting anything of value in return for: (1) the performance of any official act; (2) the commission of any fraud on the United States; and (3) doing or omitting any act in violation of his official duty.

Since most State constitutions also embody the speech or debate privilege (see *Tenney v. Brandhove*, 341 U.S. 367, 375 n. 5) the reasoning of the court below also calls into question the numerous provisions directed against the misconduct and conflicts-of-interest of State legislators. See the statutes set out in the opinion of the district court, App. 54 n. 6.



B. THE ENGLISH BACKGROUND SUSTAINS THE VIEW THAT THE PRIVILEGE OF FREE SPEECH AND DEBATE WAS DESIGNED TO PROTECT THE CONTENT OF SPEECH, NOT THE ANTECEDENT ACT OF ACCEPTING A BRIBE.

There is nothing in the historical development<sup>9</sup> of the legislative privilege in England to support the view that it was intended to offer a legislator immunity from prosecution for receiving a bribe to perform an official act. To the contrary, the entire development related solely to the content of official speech or action.

1. The first significant claim that a legislator could not be punished for the content of legislative speech occurred in 1455 in the case of Thomas Yonge (Young), one of the "knights for the shire and town of Bristol."<sup>10</sup> He complained to Commons that he

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<sup>9</sup> The principal authorities we have relied upon for the English historical development are the following: Taswell-Langmead, *English Constitutional History* (Eleventh ed., Plucknett, 1960); May, *Law of Parliament* (7th ed. 1873); 1 Anson, *Law and Custom of the Constitution* (3d ed. 1897); Wittke, *The History of English Parliamentary Privilege* (1921); Neale, *Free Speech in Parliament* (Tudor Studies, 1924); Chrimes, *English Constitutional History* (1953), and 6 Holdsworth, *History of English Law*, (1924). For convenience, we will hereafter refer to these texts by the author, followed by appropriate page numbers.

<sup>10</sup> There is an earlier case (1397) involving one Thomas Haxey who, because he had petitioned Commons that the expenditures of the royal household be reduced, was condemned as a traitor and sentenced to death. In 1399, after Henry IV had ascended the throne, he annulled the judgment on the petition of the Commons which pointed out that the entire procedure was "contrary to the usual course in Parliament, and in destruction of the most ancient customs of the Commons." A number of commentators, however, have dis-

had been arrested for a motion made by him in Commons concerning the descent of the throne. The importance of his petition for relief was the novelty (at that time) of his claim that members of Commons by their ancient liberty "ought to have their freedom to speke and sey in the Hous of their assemble, without eny maner chalange, charge or puny-cion therefore to be leyde to theyme in eny wyse."<sup>11</sup>

Under Henry VIII, the Commons began to articulate its privileges, at first hesitantly but later with increasing vigor and reliance upon precedent. In 1512 one Richard Strode, a member of the Commons, had been imprisoned by a county court on the ground that certain bills he had introduced in Commons were contrary to the law of the local "stannary" (Parliament) of the county that he represented. By statute, Commons declared the local proceedings void and further enacted, with the approval of the Lords and the Crown, that all suits against members of Parliament "for any bill, spekyng, reasonyng, or declaryng of any mater or maters concerning the Parliament, to be communed and treated of, be utterly voyd and of non effecte."<sup>12</sup> By 1542, and generally thereafter, the petition of the Speaker of the House of Commons

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counted the significance of the case in the development of the privilege because Haxey was not an elected member of Commons. See, e.g., *Taswell-Langmead*, 174-175, 196; *Neale*, 259; but cf. Veeder, *Absolute Immunity In Defamation: Legislative and Executive Proceedings*, 10 Colum. L. Rev. 131, 132, n. 4 (1910).

<sup>11</sup> Wittke, 24-25; *Taswell-Langmead*, 196, 247-249.

<sup>12</sup> *Taswell-Langmead*, 248-249.

presented to the King at the opening of Parliament claimed the privilege of legislative freedom of speech among the prerogatives of members of the Commons.<sup>13</sup>

In the time of Elizabeth I, when Commons was claiming the right to initiate legislation, particularly on ecclesiastical matters, Commons asserted an unimpeachable freedom of speech and debate. Thus in 1566, when the Queen commanded Parliament to terminate its discussion concerning her possible marriage or her naming of a successor, a member of Commons questioned whether the Queen's directive cutting off debate was "not against their liberties and privileges." After continued discussion in Commons, the Queen found it advisable to revoke her prohibition.<sup>14</sup> In the next twenty years, this question of initiative led to repeated conflict with the Crown. Commons asserted that a limitation on its power to initiate and debate legislation was in derogation of its privilege of free speech, while Elizabeth sought to control the power of initiative by declarations of prohibition and temporary imprisonment of especially vociferous members of Commons.<sup>15</sup> In her

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<sup>13</sup> *Taswell-Langmead*, 246-247.

The other basic privileges at the time were (1) freedom from arrest and molestation; (2) access to the King's person whenever occasion required and (3) that all proceedings in Commons should receive the most favorable construction from the Crown. See *May*, 64-65.

<sup>14</sup> *Neale*, 276; *Taswell-Langmead*, 311-313, 316-317; *Wittke*, 26-27.

<sup>15</sup> See *Taswell-Langmead*, 313-317; *Wittke*, 26-27; 2 Taylor, *The Origin and Growth of the English Constitution*, 206-207 (1904); *Neale*, 278-285.

eagerness for tactical victories, however, Elizabeth revoked prohibitions previously imposed on legislative speech and left unused powers normally exercised by royal authority.<sup>16</sup> As a consequence, Commons gained the experience and boldness it needed in its struggle with the Stuarts, who sought to create a monarchy free in both theory and practice from the restraints of Commons.

In 1604, one year after James I acceded to the throne, Commons claimed that "the privileges of Parliament were as much their 'undoubted right,' as the right of property which every subject had in his lands or goods; that the House of Commons was a court of record and the highest court in the land; and that these privileges being necessary for the conduct of the business of the House, they could not be 'withheld, denied, or impaired, but with apparent wrong to the whole estate of the realm.'"<sup>17</sup> When James thereafter imposed custom duties without parliamentary consent, commanding Commons not to challenge the Crown's prerogative in this matter, Commons responded that it was "an ancient, general, and undoubted right of Parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved."<sup>18</sup>

<sup>16</sup> Neale, 285-286.

<sup>17</sup> 6 Holdsworth, 93; *Taswell-Langmead*, 334-336.

<sup>18</sup> *Chrimes*, 144-145. This principle was later embodied in the Protestation of 1621. *Taswell-Langmead*, 357-358.

The last significant case in which the privilege of legislative free speech was challenged by the Crown as an infringement on its prerogatives came during the reign of Charles I. In 1629, Eliot, Hollis and Valentine, all members of the Commons, had been imprisoned under a judgment of the Kings Bench for speeches in Commons which Charles I considered libelous and seditious. This judgment was strongly condemned by Commons, and in 1641 it declared the proceedings to be against the law and privilege of Parliament.

In reversing the judgment during the Restoration, Commons resolved that the Act of Henry VIII in Strode's Case in 1512, *supra*, p. 20, was not a special act but a law of general application, "extending to indemnify all and every the members of both houses of Parliament, in all Parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the Parliament to be communed and treated of \* \* \*." <sup>19</sup>

The principle of legislative freedom to speak was firmly fixed when it was embodied in the Bill of Rights of 1689 (I Will. & Mary Sess. 2, c. 2), which declared "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." <sup>20</sup> Thus, by the beginning of the eighteenth century, the significant century of American colonial development, Commons had the unchallenged right to

<sup>19</sup> Wittke, 29-30.

<sup>20</sup> May, 113, 115-116; 1 Anson, 153-154; Taswell-Langmead, 451.

complete latitude of discussion in the House and the right to initiate and introduce legislation on any matter whatsoever. The embodiment of this right was at the core of the speech or debate clause of our Constitution.<sup>21</sup>

It is significant that the development of the privilege in no way related to conduct beyond the official duties of the legislators. It represented an effort to obtain legislative initiative and to ward off curtailment of Parliament's authority through the device of labelling offensive legislative speech as "libelous" or "seditious." There is a sharp difference between such charges as those against which the speech or debate privilege was erected and the charge of accepting bribery. As to the former, it may be said that "erroneous statement is inevitable in free debate, and \* \* \* it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need \* \* \* to survive \* \* \*.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-272; see also *Barr v. Matteo*, 360 U.S. 564. Proof of bribery, on the

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<sup>21</sup> There is no basis for reading the speech or debate clause as embodying any concept of exclusive congressional authority to punish members for taking bribes. It is true that the growth of Parliament's right to discipline its own members paralleled, to some extent, the development of the speech and debate privilege in sixteenth and seventeenth century England. But the expansion of the so called *lex parliamenti*—Parliament's authority to punish offenses to its dignity or integrity, in many instances to the exclusion of the courts—is essentially an eighteenth century development. It took place after the content of the speech and debate privilege had become fixed and was not taken over into American jurisprudence. *Watkins v. United States*, 354 U.S. 178, 192.

other hand, involves no such danger of impinging upon the "breathing space" required for free expression because of inferences from inadvertent misstatements.

2. No post-revolutionary English decision in any way undermines the distinction between liability for the content of a legislative speech and liability for a corrupt agreement to make a speech. *Ex parte Wason*, 4 Q.B. 573 (1869), relied on by the court of appeals (R. 297) does not espouse a contrary doctrine. In that case, the complainant alleged that he had given Lord Russell a petition to be presented to the House of Lords for the removal of the Lord Chief Baron from his office. He further alleged that Russell, the Lord Chief Baron and another member of the House agreed to and did make false statements in the House, to the effect that the complainant's charge against the Lord Chief Baron was untrue. On these allegations, the court held that it had no jurisdiction over the complaint on the ground "that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law." (Opinion of Cockburn, C.J., 4 Q.B. at 576) (Emphasis added.) The Court's own words point up the crucial difference between *Ex parte Wason* and the present case. Here, unlike *Wason*, no statement in the legislature is the foundation of the charge. What is being prosecuted



is an underlying corrupt agreement to accept a bribe, which is subject to criminal sanctions whether the speech is actually made or not. See *Regina v. Bunting*, 7 Ont. Rep. 524 (1885, Canada).

C. THE COURT OF APPEALS' CONSTRUCTION OF THE SPEECH OR DEBATE CLAUSE IS OPPOSED TO THE DESIGN OF THE FRAMERS.

From the beginning, American political thinkers emphasized that the right of legislative free speech was for the benefit of the people who were being represented. This concept was embodied in a number of early State constitutions. The Massachusetts Constitution of 1780, for example, provided: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever" (Part The First, Art. XXI).<sup>22</sup> (Emphasis added.)

The privilege had been incorporated in the Articles of Confederation, (Article 5, clause 5) in essentially the same form as it appears in the Constitution. James Wilson, a member of the Committee of Detail which was responsible for the insertion of the speech or debate clause into the Constitution, explained the provision as follows:

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<sup>22</sup> 1 Poore, *Constitutions and Charters*, 956, 959, (1878). See for almost the same formulation, the New Hampshire Constitution of 1784, Part 1 (The Bill of Rights), Article XXX, 2 Poore, *supra*, 1280-1283. See also *Coffin v. Coffin*, 4 Mass. 1, 27, 28.

In order to enable and encourage a *representative of the public to discharge his public trust* with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence. [Emphasis added.] <sup>23</sup>

It would be a serious distortion if a provision designed to promote the fulfillment of a public trust could be used to protect a legislator in the very act of forsaking that trust in favor of a private allegiance. That such a construction of the clause offends the design of the framers is underscored by a consideration of the historical events to which they were reacting at the time they drafted the Constitution.

In the eighteenth century, having lost the power to limit the authority of Commons to speak and initiate legislation, the Crown turned to more subtle methods of control. "Votes which were no longer to be controlled by fear, were purchased with gold." <sup>24</sup> Throughout that period, "the corruption of individual members, by places, by pensions, and by bribery" <sup>25</sup> became a way of political life. The systematic maintenance of a ministerial majority by the regular payment of bribes is said to have been the "invention" of Sir Robert Walpole, Chief Minister of the Crown dur-

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<sup>23</sup> 2 *Works of James Wilson* 38 (Andrews ed. 1896).

<sup>24</sup> 1 May, *The Constitutional History of England*, 300 (1889).

<sup>25</sup> 1 *Anson*, 331.

ing the period.<sup>26</sup> Thereafter, George III, acting as his own minister in these matters, was reputed to have bribed members of Commons to maintain a majority in that House to support his policies in the Revolutionary War.<sup>27</sup>

This technique of government by corruption was greatly aided by the fact that the Commons owed no meaningful responsibility to the people it purportedly represented. As a consequence of the Revolution of 1649, "[t]he prerogative of the Crown had been still further limited; the power and activity of Parliament being proportionally increased, while no means had yet been taken to insure its responsibility to the people. A majority of the House of Commons—beyond the reach of public opinion,—not accountable to its constituencies,—and debating and voting with closed doors,—held the political destinies of England at its mercy."<sup>28</sup> Seats in Commons were controlled by a small number of powerful families, with members responsive to their will. In this situation "when the Crown bid for votes in the House, it was but outbidding or supplementing the influence and connexions of the aristocratic families who dominated the party affiliations of many of the members."<sup>29</sup>

In the middle of the eighteenth century the Crown was able to use Commons to its own purposes in the

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<sup>26</sup> 1 Anson, 331-340.

<sup>27</sup> 10 Holdsworth, *History of English Law*, 104-105 (1938).

<sup>28</sup> 1 May, *The Constitutional History of England*, 300 (1889).

<sup>29</sup> *Chrimes*, 171; 1 Anson, 343.

celebrated case of John Wilkes. After being thwarted by Wilkes' successful assertion of parliamentary privilege in its attempt to prosecute him for the publication of a paper labelling false certain statements made by George III, the Crown turned to Parliament for help. The "royally-controlled" Commons held the document to be a libel and breach of privilege and ordered it burned. The next few years saw Wilkes repeatedly expelled from Commons in its exercise of control over its own elections despite his repeated election. His struggle with the Crown and Parliament lasted almost twenty years, until he gained final victory. As one scholar has pointed out:

He had directed popular attention to the royally-controlled House of Commons, and pointed out its unrepresentative character, and had shown how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned.<sup>30</sup>

There can be no doubt that the founders were aware of the political corruption in England when they adopted our Constitution. In obvious reference to this situation, one of the framers pointedly noted that it was "notorious, that [legislators] are more frequently the representatives and instruments of the executive magistrate, than the guardians and advocates of the popular rights."<sup>31</sup> Indeed, the framers could personally testify to

<sup>30</sup> Wittke, 122. See also, *id.* at 115-120.

<sup>31</sup> *The Federalist*, No. 56 (Hamilton or Madison), p. 387 (Bourne ed. 1914).

the use in England of parliamentary privilege "as a screen for the basest oppression."<sup>32</sup> The Wilkes affair was fresh in their minds<sup>33</sup> as were the machinations of George III in bending Commons to his will in the Revolutionary War by financial and other inducements. In the face of this immediate history, one can hardly infer that when the framers embodied in our Constitution the right of legislative free speech and debate, they conceived of it as rendering Congress impotent to provide for judicial prosecution of members of Congress for bribery.<sup>34</sup> The framers, deeply opposed to Parliament's disregard for public sentiment, sought to establish a Congress responsive to the will of its constituents. It would have been contrary to this design to protect legislative bribe-taking from criminal sanctions. Free speech or debate was not to be questioned, but breaches of public trust, such as were common in eighteenth century England, were surely never thought to be privileged.

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<sup>32</sup> Wittke, 15.

<sup>33</sup> As James Madison's biographer rhetorically inquired "What American newspaper of the day ever failed to carry his name?" 1 Brant, *James Madison The Virginia Revolutionist*, 136 (1941).

<sup>34</sup> It is interesting to note in this connection that the very same provision of the Constitution which granted freedom of legislative speech (Article 1, Section 6) also provided that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." It has been suggested that this provision was the forerunner of modern day conflict-of-interest statutes. See *United States v. Brown*, No. 399, O.T. 1964, slip op. 1, 6, (dissenting opinion).

## II.

ARTICLE I, SECTION 5, OF THE CONSTITUTION DOES  
NOT RESTRICT THE POWER OF CONGRESS TO PRO-  
VIDE FOR JUDICIAL PUNISHMENT OF A MEMBER  
WHO TAKES A BRIBE

Arguably, the court of appeals may have based its opinion in part on the view that "the Constitution has clothed the House of which [respondent] is a member with the sole authority to try him"<sup>35</sup> (R. 303). In so stating, the court referred to that part of Article I, Section 5, which reads:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Any suggestion that this grant of intramural authority carries with it a limitation on judicial power to punish Congressmen for bribe-taking is unsound. Moreover, it has already been flatly rejected by this Court.

1. In *Burton v. United States*, 202 U.S. 344, this Court affirmed the conviction of a United States Senator for agreeing to receive and receiving compensation from a private party for his services in relation to a mail fraud proceeding pending before the Post Office Department—a violation of Section 1782 of the Revised Statutes. It was argued that that

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<sup>35</sup> It seems to us more likely that the court below based its decision only upon its construction of the speech or debate clause and then observed that, as a result of that construction, the only forum open to try respondent would be the House.

statute was invalid because it conflicted with Article I, Section 5, by which "the Senate is made \* \* \* the sole judge of the qualifications of its members, and, with the concurrence of two-thirds, may expel a Senator from that body" (202 U.S. at 366). In rejecting this contention, the Court ruled that "there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named" and that "it was never contemplated that the authority of the Senate to admit [a member] to a seat in its body \* \* \* or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact" statutes otherwise within its competence (202 U.S. at 367).

In an analogous situation, this Court has made it clear that a statute providing judicial sanctions for an offense which is also punishable by the House against which it is committed is not objectionable as an invalid delegation of legislative authority. Thus, while Congress has been held to have inherent authority to punish a nonmember for contempt,<sup>36</sup> it may also enact legislation (now 2 U.S.C. 192, originally adopted in 1857)<sup>37</sup> providing for the trial of a con-

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<sup>36</sup> *Anderson v. Dunn*, 6 Wheat. 204. But cf. *Marshall v. Gordon*, 243 U.S. 521, 543-544 (dictum).

<sup>37</sup> Interestingly, this legislation was directly prompted by the refusal of a newspaperman to divulge to the House of Representatives the names of those Congressmen who he had claimed in the press were soliciting bribes on matters pending in the House. See *Watkins v. United States*, 354 U.S. 178, 207-208, n. 45.



tumacious witness in a court of law. *In re Chapman*, 166 U.S. 661, 671-672; *Jurney v. MacCracken*, 294 U.S. 125, 151-152. The same principle applies here. Congress may punish its own members for corrupt practices<sup>38</sup> and may also make such behavior a crime triable in the courts.

2. As we have noted (*supra* pp. 7-8, 13-14), Congress has never viewed its disciplinary power as exclusive. Indeed it is by no means clear that even the English Parliament, which had immensely expanded its power to punish for offenses to its prerogatives by the eighteenth century, had succeeded in obtaining the exclusive right to try members accused of taking bribes in connection with their official duties.<sup>39</sup> But

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<sup>38</sup> *In re Chapman*, 166 U.S. 661, involved a Senate investigation into charges that some Senators had been speculating in sugar stocks during the consideration of a tariff bill. The Court held this investigation within the purview of Article I, Section 5 (*id.* at 669-670).

<sup>39</sup> There is no doubt that Parliament itself punished its own members who took bribes. However, one English historian (whose treatise was cited by this Court in discussing the legislative privilege from arrest, *Williamson v. United States*, 207 U.S. 425, 442) has written—albeit without the citation of direct authority—that a member of Parliament “who is found guilty of bribery forfeits his seat, and is ineligible for that parliament, besides being liable to prosecution in the same manner as bribed voters and persons corrupting them \* \* \*.” Bowyer, *Constitutional Law of England*, 90 (2d ed. 1846). Apparently, Bowyer’s view stemmed from the ruling of Lord Mansfield in *Rex v. Pitt*, 3 Burr. 1335 (1767) that bribery at election of members of Parliament was always a crime punishable at common law. This ruling has also been relied upon by later Commonwealth cases for the proposition that a legislator was subject to common law punishment for tak-

even if Parliament's disciplinary power were exclusive, it is clear that the framers did not intend to vest Congress with the sole authority in this area.<sup>40</sup> To the contrary, the broad scope of Parliament's power in the middle of the eighteenth century, which had resulted in flagrant abuses,<sup>41</sup> and which was emu-

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ing a bribe in connection with his official duties. See *Rex v. Boston*, 33 C.L.R. 386 (1923, Australia); *Regina v. White*, 13 S.C.R. 322 (1875, N.S.W.); *Regina v. Bunting*, 7 Ont. Rept. 524 (1885, Canada).

<sup>40</sup> That there is no historical link between Congress' disciplinary power and the *lex parliamenti*, the disciplinary power of the eighteenth century Parliament, was noted by this Court in *Anderson v. Dunn*, 6 Wheat. 204, 233:

The truth is, that the exercise of the powers given [Congress] over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the state which sent him.

<sup>41</sup> By the eighteenth century, Commons "could take cognizance of almost any offense under the *lex parliamenti*, punish it as a breach of privilege, and thus invade the field of jurisdiction that rightly belonged to the judges of the *lex terrae*" (Wittke, 200). From its basic privilege that its members were free from civil arrest or molestation, Commons successfully asserted the power to punish trespass on the estates of members, theft of their goods or those of their servants and the arrest of their servants. Correspondingly, members of Commons and their servants were declared to be outside the reach of the common law courts during the time that Parliament was sitting. This led to the sale of "protections", issued under the seal of particular members, stating in effect that named persons were servants of the member and should be

lated, with similar results, in many of the Colonial Assemblies," was viewed with suspicion by the framers. Their writings repeatedly expressed fear of legislative excess. Madison pointed out that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." It was not enough, he thought, for the Constitution "to mark, with precision, the boundaries" of the various departments of government; additionally, he believed that obstacles had to be erected against the possible abuse of power by a legislative assembly. For "in a representative republic, \* \* \* where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the

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free from arrest, imprisonment and molestation during the term of Parliament. In addition, Commons not only asserted the power to determine the outcome of disputed elections but sought to broaden that authority by asserting the sole jurisdiction to determine who composed the lawful electorate in a particular election (*Wittke* 56-57, 63-77; *Taswell-Langmead*, 321-322, 580-582). As this Court described this development in *Watkins v. United States*, 354 U.S. 178, 188-191, both Houses of Parliament "claimed absolute and plenary authority over their privileges", the right to declare "what those privileges were", what "new privileges were occasioned", and "what conduct constituted a breach of privilege."

<sup>42</sup> See Clarke, *Parliamentary Privilege in the American Colonies* (1943) particularly at 15-22, 29-58, 72, 103-109, 117, 123-124, 127-130. See also Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691, 780 (1926).

objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.”<sup>43</sup> In the same vein, Jefferson wrote to Madison in 1789 that “[t]he tyranny of the legislatures is the most formidable dread at present, and will be so for long years.”<sup>44</sup>

In light of this background, one cannot read into Article I, Section 5 an intention to define a legislative power so sweeping as to preclude judicial investigation of charges of official corruption against members of Congress.

3. Sound considerations of policy support the same conclusion. In the first place, legislative machinery is not well suited to resolving the sensitive issue of individual wrongdoing. The 1857 statute dealing with contumacious witnesses was adopted in part “to avoid the procedural difficulties” inherent in legislative trial.<sup>45</sup> Moreover, the initiation, as well as the outcome, of a legislative trial is apt to be governed by political factors extraneous to the dictates of justice

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<sup>43</sup> *The Federalist*, No. 48, pp. 338-340 (Bourne ed. 1914). See also *The Federalist*, Nos. 49, 56, 73; *United States v. Brown*, No. 399, O.T. 1964, slip op. 5-7.

<sup>44</sup> Quoted in *Tenney v. Brandhove*, 341 U.S. 367, 375, n. 4.

<sup>45</sup> Of course, an even more important reason was “to permit the imprisonment of a contemnor beyond the expiration of the current session of Congress.” *United States v. Bryan*, 339 U.S. 323, 327; *Watkins v. United States*, 354 U.S. 178, 207, n. 45; *Jurney v. MacCracken*, 294 U.S. 125, 151.

in the particular case.<sup>46</sup> As one commentator has recently pointed out, "Congress itself has been notoriously slow and exceedingly reluctant to apply its own palliatives to situations of legislative slander. In the entire course of this country's existence only eighteen attempts were made by Congress to purge itself of what Congress considered 'unhealthy' elements."<sup>47</sup>

A judicial trial, by comparison, offers greater protection to the interests of the public and of the Congressmen involved. The criminal penalty places a Congressman's conduct under inquiry only if a grand jury determines that there is probable cause to believe that he has betrayed the public trust. It gives the accused legislator the benefits of all the constitutional guarantees applicable in the trial of criminal cases, and it provides an impartial tribunal to protect an unpopular Congressman from a politically motivated legislative forum. Moreover, statutes making legislators triable in the court for breaches of their trust help to eliminate suspicions that a legislator's acts are corruptly motivated and promote public confidence in the integrity of Congress.

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<sup>46</sup> See the report of the Senate committee appointed to investigate the case of Senator John Smith, charged with complicity in the Aaron Burr conspiracy. Sen. Doc. No. 278, 53d Cong., 2d Sess., pp. 23-25.

<sup>47</sup> Oppenheim, *Congressional Free Speech*, 8 Loyola L. Rev. 1, 27 (1955-1956); see also Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. Pa. L. Rev. 960, 972-973 (1951).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be vacated and the judgment of conviction reinstated on all counts.

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IN THE

JOHN F. DAVIS, CLERK

**Supreme Court of the United States**

OCTOBER TERM, 1965

UNITED STATES OF AMERICA,  
*Petitioner,*

v.

THOMAS F. JOHNSON

On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit

BRIEF FOR THOMAS F. JOHNSON

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1965

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

THOMAS F. JOHNSON

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On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit

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BRIEF FOR THOMAS F. JOHNSON

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**OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 337 F.2d 180. The opinion of the District Court is reported at 215 F. Supp. 300.

**JURISDICTION**

The judgment of the Court of Appeals was entered on September 16, 1964. On October 19, 1964, the Chief Justice extended the time for filing the petition for a writ of certiorari to and including November 15, 1964 (a Sunday). The petition was filed on November 16, 1964, and was granted on January 25, 1965 (379 U.S. 988).<sup>1</sup>

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<sup>1</sup> As the judgment of the Court of Appeals was entered on September 16, 1964, the last date on which to apply for certiorari would maybe have been October 16, 1964, but for the extension order entered October 19, 1964. That order by its terms fixed the last permissible date as November 15, 1964. It doubtful whether Rule 34(1)'s provision that when computation of a period of time results in a Sunday as the last day, the period embraces Monday, applies when the order of a Justice explicitly fixes a definitive last day. Johnson does not press this point and hopes that the Court will decide this case on its merits.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether Article 1, Section 6, of the Constitution providing that "for any speech or debate in either House they [members of Congress] shall not be questioned in any other place" permits the government to make a criminal charge that a member of Congress collaborated with others in the preparation of a speech in the House of Representatives, made the speech there for their benefit and received a gift for doing so.
2. Whether in enacting the conspiracy statute Congress intended that it should apply to an alleged conspiracy to make a speech in the House of Representatives for compensation.
3. Whether the indefinite nature of the conspiracy charge violated Johnson's Fifth and Sixth Amendment right that the indictment clearly inform him of the offense charged.
4. Whether this Court should repudiate the all embracing concept of conspiracy to defraud of Section 371 sought by the government.
5. Whether the District Court erred in refusing Johnson access to the transcript of testimony before the Grand Jury which indicted him when the government had breached the "seal of secrecy" in violation of Criminal Rule 6(e).
6. Whether the Fourth Circuit erred in holding that original interview notes of FBI agents are not producible under the Jencks Act.
7. Whether the District Court committed error in refusing to instruct the jury as to an essential element of the substantive offense.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the United States Constitution provides in part:

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

### AMENDMENT I.

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

### AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . .

18 U.S.C. 371, provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. 281, which was repealed after the alleged commission of the acts involved in this case, provided in part:

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

## STATEMENT

### A.

#### GENERAL

Thomas F. Johnson lives in Berlin, Worcester County, Maryland. He practiced law in Berlin and Snow Hill on the Eastern Shore of Maryland and had an office in Baltimore with a well known member of the Baltimore Bar. Johnson served as State's Attorney for Worcester County from 1934 until 1939 and in the State Senate of Maryland from 1939 until 1951. He was elected to Congress from the First Congressional District in 1958 and reelected in 1960 (App. 559-560). Johnson ran again for Congress in the fall of 1962 and, although indicted three weeks before the general election, he was only narrowly defeated.<sup>2</sup> While

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<sup>2</sup> Johnson received approximately 30,000 votes, and his Republican opponent 33,000 (App. 560).



in the State Senate of Maryland and later in Congress, Johnson continued to practice law in Snow Hill and Berlin as well as in Baltimore (App. 560-561).

## B.

### THE EVIDENCE AS TO THE SPEECH

While the government states that ten days before Johnson's speech Robinson issued a check to Johnson for \$500.00 (Gov't Brief, p. 5), it fails to tell the Court that his covering letter made clear that this was a political campaign contribution and it was so treated by Johnson (App. 566). The check was deposited in the bank account of his campaign treasurer and used, as in the case of his other campaign contributions, for advertising, radio, television, etc. in support of the candidacies of John F. Kennedy, Lyndon B. Johnson and the defendant Johnson (App. 252, 567). The check was made a matter of public record by its inclusion in an itemized report filed by the treasurer in the Circuit Court for Worcester County (App. 567).

Although Robinson made his political campaign contribution of \$500.00 to Johnson on June 20, 1960, no one testified that Johnson solicited or was promised the contribution provided he would make a speech defending Maryland State Savings and Loan Associations from an attack in the Washington Star. The Star article, of May 27, 1960, in labeling all Maryland State Savings and Loan Associations as "phonies" (Gov't Exhibit 55), was so unfair that it would seem a Maryland Congressman was not only entitled, but almost obligated, to reply to it.

In 1960 and 1961 defendant J. Kenneth Edlin was a dominant figure in two Maryland savings and loan institutions, First Colony Savings and Loan Association and First Continental Savings and Loan Association, and the defendant William L. Robinson was the general counsel

for these associations. In April and May, 1960, Edlin, Robinson and Heflin, public relations man for an Institute of Independent Savings and Loan Associations promoted by Edlin, had been discussing allegedly unfair abuses of state savings and loan associations by the Federal Savings and Loan League and by other detractors. Robinson or Edlin expressed the hope that a member of Congress might make a speech on this subject and Heflin received a draft of such a speech from Robinson on May 2, 1960. Heflin made some corrections in the draft, as well as several additional drafts, and returned them to Robinson (App. 182-184).

In the spring of 1960 Johnson had met Edlin and Robinson in connection with the financing of an Assateague Island Bridge project in Worcester County, Maryland, Johnson's home county. In May, 1960, at a luncheon of Marshall Diggs, a prominent lawyer of Washington, Johnson, Edlin and Heflin at the Congressional Hotel, Heflin was introduced to Johnson as a public relations man for the Institute of Independent Savings and Loan Associations. There was conversation about the Assateague Island Bridge project with which Diggs and Johnson were connected (App. 197). Heflin and Edlin then talked about the unjustified attacks made upon state savings and loan associations by a Federal Savings and Loan League. Heflin described the plight of the independent state savings and loan association in competition with federal savings and loan associations. He argued that though "federally insured" the federal associations were not as good an investment as the state savings and loan associations because F.S.L.I.C.'s assets were less than 1% of the insured liability. Heflin also told the Congressman that some federals had been advertising that their deposits were guaranteed by the United States Government when, in reality, they were not

(App. 149-50). Heflin pointed out to Johnson that the independent savings and loan industry in Maryland was being jeopardized by the Federal Savings and Loan League (App. 186). Johnson listened attentively (App. 186, 197). This was the only meeting of Johnson and Edlin during the months of May, June and July, 1960.

On May 27, 1960, a newspaper article in the Washington Star characterized all Maryland state savings and loan associations as "phonies" (Gov't Exhibit 55) although these associations constituted one of Maryland's oldest industries. Buarque, Johnson's administrative assistant, testified that upon publication of the Star article, he had seen it, "considered it a smear" on a Maryland industry, showed it to Johnson and told him he should answer it. Johnson told Buarque to write something for him (App. 468, 469). Heflin and Robinson went to see Johnson in his office and showed him a copy of the newspaper article as evidence of the mistreatment of the independent savings and loan associations (App. 186). Heflin, a government witness, testified that he told Johnson "It was categorically unfair. I still think so" (App. 189, 201).

Johnson turned Heflin over to his administrative assistant, Buarque. Thereafter, Heflin supplied some facts and figures for the draft of a speech which Buarque prepared (App. 189, 190).

There was no evidence that Johnson or Buarque discussed the contents of the speech with Edlin or Robinson. Johnson and Buarque testified without contradiction that they had not seen the earlier draft of a speech prepared by Robinson (App. 479), and it will be found that Robinson's May draft (App. 183) bears no substantial relationship to the speech prepared for Johnson by Buarque. Heflin, a government witness, testified that he did not prepare the

speech; it was prepared by Buarque (App. 200). Buarque confirmed this.<sup>3</sup>

The speech was devoted to answering the newspaper article attacking the integrity of the entire Maryland state savings and loan industry. The speech contained no reference to First Continental Savings and Loan Association or to First Colony Savings and Loan Association, or to any other named association (App. 931).

Buarque and Johnson testified that the reasons for the speech were (1) they considered the Washington Star article an unfair attack upon a Maryland industry and (2) this might be an issue which Johnson could grasp because he had political ambitions for state office in 1964 and he was looking for a state-wide issue (App. 480). At that time there had been no substantial savings and loan scandal in Maryland.

After the speech was made on June 30, 1960, Heflin telephoned Buarque requesting reprints and Buarque replied that the Congressman would not bear any part of the cost of them (App. 463). Buarque requested Mrs. Kiernan in Johnson's Congressional office to order 10,000 reprints from the Government Printing Office (Tr. 2643). Later a second order was received from Heflin for 40,000 reprints. When Buarque questioned the number, Heflin pointed out that reprints of Congressman King's speech in the House of Representatives defending a state savings and loan association equalled 50,000 (App. 483). Mrs. Kiernan ordered them. The small checks for reprints were endorsed by Johnson over to the Printing Office. There was no evidence that Johnson had any knowledge of the orders for

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<sup>3</sup> Buarque also identified his draft of the speech in his handwriting. (App. 477).

reprints except when Mrs. Kiernan submitted to him the checks for his endorsement.

Although Robinson was later reimbursed for his \$500 contribution to Johnson's campaign for reelection by First Continental Savings and Loan Association, there was no evidence contradicting the testimony of Johnson and Robinson that Johnson was not told that Robinson was so reimbursed. Naturally, First Continental wished a Congressman who might support state savings and loan associations to be elected.

There was no evidence that during the months of May, June and July, 1960, Johnson met with, or talked to, Edlin except at the May, 1960, luncheon attended by a number of persons. No evidence was introduced that an agreement of any kind was made at this luncheon. There was no evidence that during this time Johnson met with, or talked to, Robinson except upon the single occasion when Robinson and Heflin came to his Congressional office and showed him the Washington Star article of May 27, 1960, as evidence of the mistreatment of the Maryland state savings and loan associations, and there was no evidence of any agreement at that meeting. Throughout this long trial no one testified that there was an understanding that, if Johnson agreed to make the speech, he would receive a political campaign contribution or that he agreed to make the speech in consideration of the contribution. There was no evidence that Johnson had requested that a contribution be made to his campaign for reelection.

As to the distribution of the reprints of Mr. Johnson's speech, the savings and loan associations used them in the same way they used reprints of a speech of Congressman King of California and another of Congressman Utt of

California<sup>4</sup> (App. 201). Johnson testified that he had no knowledge of the distribution, or use, of these reprints (App. 573) and the government offered no evidence to the contrary.

As evidence of a criminal conspiracy to make a speech in the Congress, the government relies in its brief (p. 4, 6) upon the fact that Sadie Goldman<sup>5</sup> said that Edlin said, out of the presence of Johnson, he had made a "new contact" with a Congressman as a result of which "we are going to be rich". She also said that Robinson said that Johnson was "on our payroll" (App. 161, 162). The Government's brief (p. 6) also relies upon a statement of Raines that Edlin said to him out of the presence of Johnson "you see, we have friends on the Hill—we have nothing to fear on our indictment. These people are interested in us and the injustice we have been done"<sup>6</sup> (III, App. 4). In concluding that there was a sufficiency of evidence the Court of Appeals relied upon these statements (337 F.2d 196-201).

These statements of Mrs. Goldman and Mr. Raines, hearsay as to Johnson, were admitted by the District Court only against Edlin or Robinson. The District Judge correctly ruled that statements out of the presence of Johnson were not admissible against him (Tr. 421, 422). They

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<sup>4</sup> On April 28, 1960, Congressman Utt of California made a speech in the House of Representatives on behalf of the Long Beach Savings and Loan Association, denouncing the treatment of that Association by the Federal Home Loan Bank Board. On May 19, 1960, Congressman Cecil King of California made a speech in the House of Representatives on the same subject. (Tr. 470-71).

<sup>5</sup> Mrs. Goldman's husband had been President of First Continental and he was under indictment at the time of the trial (App. 279). The indictment was dismissed as to him after the trial of Johnson.

<sup>6</sup> An indictment against Raines was dismissed after the trial of Johnson.

were not admissible against Johnson under any known legal theory.

## C.

## THE SUBSTANTIVE COUNTS

The issue under each of the substantive counts was whether a particular check of Robinson or of First Continental designated in those counts was received by Johnson as compensation for his visits to the Attorney General and to the Assistant Attorney General in charge of the Criminal Division. There was no substantial dispute as to the visits to Justice by Johnson. It was undisputed that Johnson did not receive any payments from Edlin or any other defendant in the criminal case pending before the Department of Justice. It was undisputed that Johnson did receive the checks of Robinson and First Continental specified in the substantive counts and that he deposited them in his bank account as in the case of other legal fees. As in the case of other payments made by Robinson to 4 or 5 other reputable attorneys for their legal services for the savings and loan associations, Robinson was reimbursed for them (Tr. 4286-87). On the books of First Continental they were recorded as "legal fees" or "legal services" or "escrow account—Charles County Land Co." or "payment in full—Brooke [Brooke Virginia property]."

The government contended that it was a reasonable inference that these payments in whole or in substantial part constituted compensation for Johnson's visits to Justice. It was contended on behalf of Johnson that they represented payments on account of his legal services rendered First Continental and Charles County Land Company and Leisure City Land Company unrelated to his visits to Justice and, as Johnson and Robinson testified, he had not been employed by Edlin or anyone else to make his visits



to Justice and he did not receive any compensation for them.

Facts with respect to Johnson's visits to Justice not mentioned by the Government are:

(1) Johnson had been told by Edlin and Robinson that the pending criminal charge<sup>6a</sup> was unjust and had been inspired by competitors (App. 695); Johnson asked for a review of the criminal case upon its merits (Kennedy, App. 864; Miller, Tr. 2150).

(2) Johnson made no misrepresentation and no coercive statement.

(3) The Attorney General and Assistant Attorney General both testified that Johnson at the meetings said that he did not wish to interfere with the Department of Justice and he was not asking for any favors or anything improper from the Department of Justice (App. 409, 438, 862, 869, 871, 873).

(4) The Attorney General and Assistant Attorney General indicated that at the time of the meetings they did not consider the visits to be improper. There was no policy of the Attorney General against such visits by Congressmen (App. 855, 862).

(5) Johnson's visits had no effect upon the course of the criminal case and Johnson did not return to Justice after he understood in September, 1961, that a final review decision had been made to go forward with it.

(6) No one testified that any checks specified in the substantive counts, or any other checks, were paid to Johnson for his visits to Justice. The government relied in large part upon the hearsay statements out of the presence of Johnson which were not admitted against Johnson (See p. 10 herein).

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<sup>6a</sup> A defendant, First Colony, was located at Elkton in Johnson's Congressional District.

There was no evidence that Johnson had any relationship to the savings and loan associations except as local Maryland counsel for their general counsel, Robinson. Johnson was not an officer, director or shareholder of the savings and loan associations. There was no evidence that he participated in any policy decisions with respect to their operation.

Although there was clear venue in the District of Columbia of the substantive counts, as the place where the alleged services were rendered, i.e., the Department of Justice, and where the checks were received by Johnson, the government elected the District of Maryland where the only possible basis of venue—where Johnson deposited the checks in his Berlin, Maryland, bank account—was tenuous and highly conceptualistic (App. 61). The District Court acknowledged that “it is unfortunate that questions of venue should turn upon the banking law of the place where the checks were deposited . . .” (App. 68). The Court of Appeals struggled with the problem without really solving the venue perplexities engendered by the government’s selection of the artificial Maryland venue. 337 F.2d at 193-195.<sup>1</sup>

The highly charged atmosphere of the trial worked a heavy burden on court, counsel and jurors alike. In spite of his presumption of innocence, the timing of the indictment 3 weeks before the election had caused Johnson to be defeated for reelection to Congress by his Republican opponent. Congressman Johnson’s speech defending Maryland state savings and loan associations and criticizing

<sup>1</sup> If the intricacies and variations of State negotiable instruments law are too much for the United States to abide by in civil cases, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), they certainly furnish a questionable norm for venue in federal criminal cases. The clear and appropriate venue was the District of Columbia.

Federal savings and loan associations and the Federal Savings and Loan Insurance Corporation was bound to be viewed as an attack on the concept of federal insurance. At the time of trial the insolvency of some savings and loan associations in Maryland had been widely publicized and had aroused considerable public feeling. The fact that the Attorney General of the United States and the Assistant Attorney General of the United States in charge of the Criminal Division, testified on behalf of the prosecution and thus threw the weight of their high offices against the accused was without precedent. The inevitable publicity of the trial in the press and other mass media was unequalled as regards a criminal trial in the Baltimore/Washington area. The presence of all these factors made it extremely difficult to keep the scales of justice in balance.

### SUMMARY OF ARGUMENT

The argument is in two parts—Part One showing that the conspiracy count is unconstitutional and Part Two dealing with issues decided by the Fourth Circuit in favor of the government.

Part One. The Court of Appeals was right in holding that the conspiracy count, and the evidence submitted under it, violated the Speech and Debate provision of the Constitution. We show the significance of unrestrained legislative speech in the light of the American tradition of free speech and recall the numerous decisions of this Court under the First Amendment that no inhibition upon uninhibited, robust utterances is tolerable and that the tradition of legislative liberty is so central to our Constitutional heritage that it is subject to no restraint by the executive power by reason of the uniqueness of the Con-

gressional forum with its potential for immediate and vital impact on the entire nation.

The ancient lineage of the Speech and Debate provision in the history of constitutional liberty demonstrates that it was designed to preclude the Crown from making any criminal charge with respect to the motivation or content of legislative speech. The notion of the government that the constitutional provision was intended to protect only the content of speech is not supported; it was designed not to protect the content of utterances but to protect the speakers themselves from any conceivable criminal charge with respect to the intent, the purpose, the motivation or the substance of legislative utterance. *Kilbourn* in 1881 and *Tenney* in 1951 rejected the contention of the government that the Speech and Debate provision should be narrowly interpreted, the Supreme Court holding that it applied not only to utterances in the Congress but to all official acts there.

The decision of the Fourth Circuit invalidating the conspiracy charge under the Speech and Debate clause is confirmed by the historic interpretation accorded the separation of powers doctrine. Since *Fletcher v. Peck*, in 1810 it has been held without qualification that under the separation of powers doctrine the judiciary may not inquire into the motives of members of the legislative branch of the government with respect to their official acts.

There is no valid basis for the distinction asserted by the government between an antecedent criminal agreement to make a speech in the Congress and the content of speech concededly protected by the Speech and Debate clause. Even if this Court accepted in principle that distinction, the conspiracy charge here did necessarily involve the content of Mr. Johnson's speech and required an inquiry into its substance. A searching inquisition was conducted

into the motivation, the source of material, the preparation, the substance and use of the speech.

The content of speech in the Congress and a criminal charge of conspiracy as to its motivation are not separable, for no words are spoken or written without purpose. The early decision in *Strode's* case in 1512 and the resultant *Strode's Acts* of 1521 and 1667 as well as the decision of the Queen's Bench in *Ex parte Wason* in 1869 repudiate the government's new found distinction. Practical considerations disclose that a conspiracy charge and the content of a speech are inseparably linked and point up the lack of reality in the government's argument that a prosecution would lie if the speech were not delivered. The Speech and Debate provision would be emasculated if the government's restrictive contention could be accepted.

The validity of the federal bribery statute (18 U.S.C. Sec. 205) is not involved in this case because Mr. Johnson was not and could not have been charged with violating it or conspiring to do so as that statute carefully refrains from including speech or debate in the proscribed conduct; it was limited to official action and vote with respect to pending matters; Mr. Johnson's speech had no relation to any matter pending in the House of Representatives. We also show that the other contentions of the government are without merit.

To sustain the conspiracy charge the Court must find that in enacting the conspiracy statute (18 U.S.C. Sec. 371) in 1867 Congress intended that its defrauding provision, i.e., conspiracy to defraud the government, should apply to a conspiracy relative to a speech in the House of Representatives. Such an intention was rejected by this Court in *Tenney* under a comparable 1871 federal civil conspiracy statute and the reasoning of the Court there is

even more applicable here. Such an intention was also implicitly denied in *United States v. Gradwell*, 243 U.S. 476 (1917) where the Court held that the defrauding part of the same conspiracy statute involved here was not intended by the Congress to apply to the bribery of voters in elections of members of the Congress.

The indefinite nature of the conspiracy charge violated the Defendant's Fifth and Sixth Amendment right that the indictment clearly inform him of the offense charged because the charging provision of the indictment, namely, paragraph (14) (App. 4, 5), declares the unlawful objects of the conspiracy in terms so broad as to be beyond comprehension. The alleged purposes of the conspiracy are so vague, general and indefinite the government could have offered in evidence in support of the charge testimony as to any and all conduct of any defendant with respect to any matters pending before any administrative department of the government or in the House of Representatives. The indefinite charge constituted the most conspicuous confirmation of the dangers of conspiracy procedure described by this Court in *Grunewald, Krulewitch, and Kotteakos*.

This Court should repudiate the all-embracing concept of Section 371 as interpreted by Chief Justice Taft for this Court in *Hammerschmidt v. United States*, 265 U.S. 182 (1924) where the Court defined "conspiracy to defraud" as including "the obstruction of lawful governmental functions by "dishonest means" or "overreaching." These elegant words afford no standard for the application of the command of the statute. Such words have no more meaning in law than "sinful" or "wicked" or "unethical". They merely express whatever happens to be current notions of unethical or "bad" conduct, and such vagaries do not meet contemporary Sixth Amendment standards.

In Part Two of the Argument, which unavoidably lengthens the Brief, we show that, contrary to the opinion below, a fair retrial on the substantive counts requires that Johnson have access to the grand jury transcript when the government was allowed to breach "the seal of secrecy" by permitting a potential government witness and his counsel to read a volume of the grand jury testimony before trial in violation of Rule 6(e) of the Federal Rules of Criminal Procedure. The American Bar Association has recommended to the Judicial Conference of the United States that after indictment there should be a disclosure of grand jury minutes. The time has come to stop exalting "secrecy for secrecy's sake."

The District Court and the Fourth Circuit erroneously held that the original interview notes of FBI agents as to what was said to them by a defense witness and a co-defendant did not constitute Jencks Act material and therefore were not producible. This holding would seem to be in violation of *Clancy v. United States*, 365 U.S. 312 and concessions by the Solicitor General in 3 recent cases.

The policy of the FBI in requiring that original interview notes be destroyed is a plain effort to circumvent the *Jencks* decision as well as the Jencks Act and should come under the sanction of the Act, namely exclusion of the FBI agents testimony.

Johnson was denied a requested instruction on a crucial issue under the substantive counts, namely, that to convict, the jury must find that Johnson knew and understood that the checks he received constituted compensation for his visits to Justice. Actual intention not constructive intention was a prerequisite to guilt. The Court's instructions as to Johnson's knowledge and intent were ambiguous and contradictory.



# PART ONE THE CONSPIRACY CHARGE WAS UNLAWFUL

## I

### THE SIGNIFICANCE OF UNRESTRAINED LEGISLATIVE SPEECH IN THE LIGHT OF THE AMERICAN COMMITMENT TO FREE SPEECH.

The Speech and Debate clause of the Constitution, which has only been before this Court on two occasions (*Kilbourn* and *Tenney*), cannot be considered insulated from the teachings of this Court with respect to the general First Amendment right of freedom of speech.

1. Merely labeling a charge "criminal conspiracy" gives no immunity from the constitutional protection of the First Amendment. As this Court said in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964):

"In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. *N.A.A.C.P. v. Button*, 371 U.S. 415, 429, 9 L. ed. 2d 405, 415, 83 S. Ct. 328. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel [and likewise conspiracy] can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."<sup>8</sup>

<sup>8</sup> In sustaining an Illinois criminal libel statute in *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952), this Court was careful to note that the Court "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel."

2. "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."<sup>9</sup> "The opportunity should be afforded for 'vigorous advocacy' no less than 'abstract discussion.'"<sup>9a</sup> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."<sup>10</sup> "... [E]rroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"<sup>11</sup> In applying constitutional limitations to a charge of criminal contempt this Court has said "such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice."<sup>12</sup>

This Court has repeatedly struck down statutes because they might have a deterrent effect on the exercise of First Amendment freedoms. A flat license tax upon the exercise of First Amendment rights was declared unconstitutional in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). A registration requirement imposed on a labor union organizer before making a speech met the same fate in *Thomas v. Collins*, 323 U.S. 516 (1944). A municipal li-

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<sup>9</sup> *Bridges v. California*, 314 U.S. 252, 270 (1941).

<sup>9a</sup> *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

<sup>10</sup> *New York Times Co. v. Sullivan*, p. 270; *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

<sup>11</sup> *New York Times Co. v. Sullivan*, p. 271.

<sup>12</sup> *Bridges v. California*, 314 U.S. 252 (1941); *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962). In *Bridges* the criticism referred to was criticism of a judge or his decision.

censing system for the distribution of literature, *Lovell v. Griffin*, 303 U.S. 444 (1938); a denial of a tax-exemption to proponents of certain viewpoints, *Speiser v. Randall*, 357 U.S. 513 (1958); a book obscenity law which did not require *scienter* by the book seller as tending to cause a self-imposed restriction of free expression, *Smith v. California*, 361 U.S. 147 (1959); and a federal postal service act requiring an addressee in order to receive his mail to request in writing that it be delivered, *Lamont v. Postmaster General*, 14 L. Ed. 2d 398 (1965), were deemed to abridge freedom of speech because they were likely to have a deterrent effect.

As Mr. Justice Douglas said for the Court in *Lamont* "the regime of this Act is at war with the 'uninhibited, robust and wide-open' debate and discussion that are contemplated by the First Amendment." "But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."<sup>13</sup> In no event may an intrusion on First Amendment rights be sustained on the ground that the intrusion was only a minor one.<sup>14</sup>

3. If a charge of criminal conspiracy with respect to the motivation or purpose of a speech made in the House or the Senate on the ground that it is venal or unethical were sustained, serious inhibitions with respect to speech, debate and discussion there would follow. As the Fourth Circuit well said in this case:

"A practical reason exists for invoking the congressional privilege, which meets the objective of the

<sup>13</sup> *Lamont*, 14 L. Ed. 2d 403, concurring opinion of Mr. Justice Brennan; *Freedman v. Maryland*, 380 U.S. 51 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

<sup>14</sup> *Lamont*, 14 L. Ed. 2d 404; concurring opinion of Mr. Justice Brennan; *Boyd v. United States*, 116 U.S. 616, 635 (1886).

constitutional provision. The design is to promote the independence of all congressmen. To avoid restraint on free expression on the floor of either House, protection is given against the hazard and harassment of inquiry in any court. It is no answer, therefore, to say that if the accused member is innocent of accepting a bribe he has nothing to fear. A groundless charge [criminal indictment] may be sufficient to destroy him at the polls. Moreover, the process of indictment by a grand jury and inquiry in a court may itself be so devastating that an innocent congressman may well fear it." 337 F.2d at 191.<sup>15</sup>

A member of the House of Representatives must of necessity rely heavily on gifts in the form of political campaign contributions to finance the constantly rising costs of his political campaigns requiring access to the various forms of mass communication media. This, as well as an awareness that a Congressman may be swept out of office at any election, has made it mandatory for those without independent means to retain outside economic interests or continue their business or profession.<sup>16</sup> These

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<sup>15</sup> See also note on *Johnson v. United States*, 78 Harv. L.R. 1473 (1965).

<sup>16</sup> The Association of the Bar of the City of New York (Manning, ed.) (1960) *Conflict of Interest and the Federal Service*, pp. 13-16. "In fundamental respects, however, the congressional problem differs from that of the executive. It is too easy to say glibly that rules governing the administrator should govern the legislator. The Congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry—though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would

facts of political life suggest that a power of the executive to indict a Congressman on the ground that a political campaign contribution or income from an outside business source was the *true* motivation for a speech he delivered in the halls of Congress would be a very great power indeed.

For a Congressman "... to decide at what point and on which issue he will risk his career is a difficult and soul searching decision."<sup>17</sup> To give the executive branch this weapon it seeks to wield against speech in Congress would create a substantial obstacle to the exercise of courage by a legislator. If the executive branch is given such a power of intimidation, it would gain a club to hold over the head of each member of the Congress who has spoken out in favor of a cause where the proponents of that cause have either contributed to his campaign or employed him in a professional capacity. Such a deterrent to the exercise of free speech in the Congress should not be countenanced.

Thus, the acceptance of a gift or a political campaign contribution by a member of Congress is not inherently unethical or dishonest even if it bears some relationship to an innocent act such as a speech. Speeches made with the

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prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government.

"Furthermore, no member of Congress can subsist on his government salary. Forced to keep his base and to spend time in his home district, he unavoidably incurs heavy and regular travel expenses. Campaign costs soar as campaign techniques turn to mass communication media. And the congressman must always be prepared to sail on the next ebb of the political tide. These facts, taken together with the myth that membership in Congress is still a part-time job, ensure that congressmen will keep up their outside economic connections, and that they will insist upon the necessity and justice of their doing so."

<sup>17</sup> Kennedy, *Profiles in Courage* (1955, p. 12).

hope and even the immediate prospect of campaign contributions must be numberless. Undoubtedly there have been innumerable instances of Senators and Representatives who have espoused causes and received some related compensation in an infinite variety of forms, i.e., presidential patronage, promises of political support and political contributions. It must be remembered that a member of Congress is answerable for any impropriety in his conduct both to the Congress and to his electorate.

If such a charge can be leveled at a member of the Congress, then the investigative apparatus of the executive power can proceed to inquire into the motivation of any speech made in the Senate or House. Agents of the Federal Bureau of Investigation may intrude themselves into the halls of the Congress and the Senate and House Office Buildings, interview the staff personnel of members of Congress, contributors to Congressional campaigns and others—all for the purpose of ferreting out whether an utterance in the Congress was made, or influenced, by improper or unethical or dishonest motives. Such an investigation, without more, should be deemed an intolerable affront to the privilege of freedom of speech in the Congress.

If such a conspiracy charge were constitutionally permissible, before exercising his right of freedom of speech it might be incumbent upon a prudent member of the Congress to seek and obtain an opinion of the Attorney General that his proposed speech would be permissible and would not violate the conspiracy statute. Such a potentially all embracing, all pervasive restraint upon the right of freedom of speech within the very halls of Congress would be intolerable and irreconcilable with the numerous teachings of this Court. In the area of free speech, conduct may not be restricted "to that which is

unquestionably safe."<sup>18</sup> "... the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times Co. v. Sullivan*, p. 278. As Judge Learned Hand carefully explained in his discussion of the balance of values involved in such a situation "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant threat of retaliation."<sup>19</sup>

As the Fourth Circuit pointed out in its opinion (p. 191) the possibility of ultimate vindication from such a charge in a court proceeding by a member of Congress is no substitute for the guarantee held out by the Constitution. Fear of a charge by indictment and subsequent trial may be itself so devastating that the most innocent Congressman would necessarily dread such an occurrence to the point where he would suffer silently rather than risk such public humiliation.<sup>20</sup>

4. Freedom of speech and debate in the Senate and House of Representatives has been a cherished tradition of our constitutional history. However highly valued the right of freedom of expression elsewhere may be,<sup>21</sup> that right of the elected representatives of the people within the walls of the Congress has an even greater claim to immunity from restraint. Legislative liberty involves lit-

<sup>18</sup> *Baggett v. Bullitt*, 377 U.S. 360 (1964).

<sup>19</sup> *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

<sup>20</sup> In spite of Johnson's presumption of innocence, it is evident that his indictment 3 weeks before his election occasioned his defeat. See footnote 2.

<sup>21</sup> The Constitutional safeguard "was fashioned to assure unfettered interchange of ideas or the bringing about of political or social changes decided by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).



tle more than the right to speak in a legislative body without restriction, restraint or inhibition. Indeed the concept of legislative liberty has been deemed the very basis of our governmental system and all other privileges. "The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual." Story, *Commentaries on the Constitution*, (5th Ed. 1891) Vol. I, p. 630. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators."<sup>22</sup>

Freedom of speech outside of the halls of Congress may be subject to an exercise of the police powers, including valid obscenity laws and valid libel and slander laws, but it is submitted that the tradition of legislative liberty is so central to our constitutional heritage that it is subject to no restraints or inhibitions by the executive power. The only appropriate restraint is that provided by the Constitution—the disciplinary power of each House. Free speech and debate are important in Los Angeles, California, and Savannah, Georgia, but the uniqueness of the Congressional forum with its potential for immediate and vital impact on the entire nation entitles speech there to special protection. This Court should be especially hesitant to threaten an outlet for speech where there is *no alternative outlet* with the same potential for impact as that threatened.

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<sup>22</sup> *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

## II

THE SPEECH AND DEBATE PROVISION OF ARTICLE I, SECTION 6, OF THE CONSTITUTION DENIED THE EXECUTIVE AUTHORITY TO BRING, AND THE DISTRICT COURT AUTHORITY TO HEAR, THE CONSPIRACY CHARGE CONTAINED IN COUNT ONE OF THE INDICTMENT.

By pretrial motion Johnson moved to dismiss the conspiracy charge of the Indictment upon the ground that it violated the provision of Article I, Section 6, of the Constitution, that "for any speech or debate in either House they (members of Congress) shall not be questioned in any other place". The District Court denied the motion on the ground that the constitutional provision only applied in civil and criminal prosecutions for libel, slander, treason and sedition, and therefore the Constitution did not bar a criminal prosecution charging a conspiracy by a member of the Congress to make a speech in either House for profit<sup>23</sup> (App. 55).

In the unanimous opinion by Chief Judge Sobeloff, the Fourth Circuit reversed Johnson's conviction. The Court's language is instructive (337 F.2d 189-190):

"Inevitably, the indictment required an inquiry into Johnson's reason for delivering the speech the very inquiry which the Supreme Court has explicitly declared to be beyond a court's power. *Tenney v. Brand-*

<sup>23</sup> At the conclusion of the Government's testimony and at the conclusion of all the evidence, the District Court also denied motions of Johnson for judgments of acquittal under the First Count of the Indictment. These motions asserted that the evidence submitted by the Government questioned speech or debate in the House of Representatives and therefore violated the constitutional prohibition. See also Johnson's motion for a new trial and in arrest of judgment (App. 973).

hove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951). The contents of the speech as such were not challenged. In fact the indictment attacked only the purpose for which the speech was made, i.e., 'to defraud the United States.' To prove this, however, the speech in its entirety was introduced into evidence and was commented upon extensively by the prosecution during the trial and in the closing arguments. Since Johnson could not deny making the speech it naturally became necessary for him to demonstrate that his purpose for delivering it was good. But the Supreme Court has declared in *Tenney* that '(t)he claim of an unworthy purpose does not destroy the privilege.' 341 U.S. at 377, 71 S. Ct. at 788. The speech was more than an incidental feature of the conspiracy charged. Fully one-half of the testimony introduced at the trial related to the speech.

"Federal cases discussing the privilege have repeatedly held that the good or bad faith of the member making the speech is immaterial. Indeed this is precisely the teaching of *Tenney*. In *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.) cert. denied, 282 U.S. 874, 51 S. Ct. 79, 75 L. Ed. 772 (1930), for example, the complaint alleged that a Senator '(m)aliciously, wilfully, falsely and wrongfully' delivered a 'scandalous, malicious and defamatory slander' in a speech on the floor of the Senate. In affirming the District Court's dismissal of the complaint, the court held that 'the words forming the basis of plaintiff's action were uttered in the course of a speech in the chamber of the Senate of the United States and were *absolutely privileged* and not subject to 'be questioned in any other place.' " 42 F.2d at 784 (Emphasis added.).

It is submitted that at the threshold of this case in denying the motion to dismiss, the District Judge violated a clear, unambiguous declaration of the Constitution because the allegations of the conspiracy charge with respect to Johnson's speech in the House of Representatives did

plainly question "speech or debate" "in any other Place"; that there is no legal authority in the United States, and none in England since the Bill of Rights of 1689, in support of the drastic limitation the District Judge attempted to write into the constitutional provision; that his restriction was in conflict with two Supreme Court decisions and disregarded numerous other Supreme Court decisions that, under the separation of powers principle, the judiciary may not inquire into the motives of members of the Congress as to their official acts; and that the District Judge struck a crippling blow at an ancient and cherished principle of constitutional liberty.

#### A.

##### THE ALLEGATIONS OF THE FIRST COUNT

The First Count charged in Paragraph (14) a conspiracy of the Defendants to defraud the United States of (1) the faithful services of Congressman Johnson and Congressman Boykin in the conduct of their official duties and of (2) the faithful services of the administrative officers of the United States, including the officials of the Department of Justice.

Paragraph (14) (d) of the First Count charged that the Defendants conspired to deprive the Government of the faithful services of Johnson and Boykin in their official capacity as members of the Congress, uninfluenced by corruption and uninfluenced by money payments to them by the other Defendants "as compensation for services rendered and to be rendered by said Thomas F. Johnson in behalf of the said other Defendants . . . in relation to matters pending in the House of Representatives . . ." (App. 5). Paragraph (15) asserted that it was a part of the conspiracy that this Defendant should, at the request of Defendants Edlin and Robinson, render

services for compensation by making of a speech defending the operation of Maryland savings and loan associations on the floor of the House of Representatives (App. 5, 6). Paragraph (16) alleged that it was a part of the conspiracy that Defendants Johnson, Edlin and Robinson did cause to be reprinted copies of the speech for distribution to the public at large, etc. (App. 6).

Overt Act (1) claimed Edlin, Robinson and Johnson met and discussed the contents of the proposed speech to be given by Johnson on the floor of the House of Representatives (App. 9). Overt Act (2) claimed that Robinson and others prepared drafts of the proposed speech (App. 9). Overt Act (3) charged that Johnson received a check for \$500.00 from Robinson, implying that this sum constituted compensation for the making of said speech (App. 10). Overt Act (4) alleged that on June 30, 1960, Johnson delivered a speech on the floor of the House of Representatives. Overt Act (5) refers to a check for \$168.91, of First Continental Savings and Loan Association, payable to this Defendant, implying that it was received in connection with said speech.<sup>24</sup> Overt Acts (6) and (7) (App. 10) charged that this Defendant directed the reprinting of copies of the speech delivered on the floor of the House of Representatives on June 30, 1960.

## B.

### THE CONSTITUTIONAL PROVISION AND ITS ANCIENT LINEAGE IN THE HISTORY OF CONSTITUTIONAL LIBERTY

The principle embodied in Article I, Section 6 of the Constitution was not fully established in British Parlia-

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<sup>24</sup> The evidence showed that Johnson endorsed this check to the Public Printer in payment of reprints of his speech which his office ordered for a State Savings and Loan Institute.

mentary history until the Bill of Rights of 1689. Hereafter there are reviewed the land-marks of the great struggle between the House of Commons and the Crown finally resulting in the establishment of the principle of liberty as to speech and debate in Parliament. That history demonstrates clearly that the speech and debate provision of the bill of Rights was designed to preclude the Crown from making any criminal charge with respect to the motivation or content of legislative speech.

At the Federal Constitutional Convention the pertinent clause of Article I, Section 6, was adopted without opposition. Only two proposals with respect to the provision were offered and these were not accepted. William Pinkney proposed that it be provided that each House should be the sole arbiter of the privilege. Madison advocated that the extent of the privilege should be delineated.<sup>25</sup> It will be found that the Constitution of almost every state of the Union and almost every foreign democratic nation now contains a constitutional provision that speech and debate in its Congress or Parliament may not be questioned or impeached elsewhere.<sup>26</sup> Thus its great principle has achieved an almost universal acceptance.

### C.

#### IN SUSTAINING THE CONSPIRACY CHARGE OF THE INDICTMENT THE DISTRICT COURT VIOLATED THE LETTER AND THE SPIRIT OF THE CONSTITUTIONAL PROVISION

The concise Constitutional Declaration that "for any speech or debate in either House they [members of Con-

<sup>25</sup> Butzner, *Constitutional Chaff*, p. 47.

<sup>26</sup> For example see the Constitutional provisions of Argentina, Art. 61; Belgium, Art. 4; Czechoslovakia, Sect. 44; France, Art. 21; Ireland, Art. 15, Paragraph 13; Italy, Art. 68; Japan, Art. 5; Luxembourg, Art. 68; Netherlands, Sec. 100; Peru, Art. 104 and Portugal, Sec. 89(a).

gress] shall not be questioned in any other place" is clear and unambiguous. It is absolute in its categorical imperative. The clause does not grant an authority to the Congress with respect to Speech and Debate. It assumes the power and denies any authority to the executive or the judiciary in this limited area. It admits no qualification; it concedes no exception. The principle proclaims the exclusive authority of the House and Senate to inquire into the propriety or legality of speech and debate within their chambers. They, and they alone, may charge, hear, acquit, convict or impose sanctions with respect to such matters. The constitutional principle contests no power of the Congress; it admits and reaffirms the power. Although usually referred to as "a privilege", it is a complete denial of any power or authority to the executive and to the judiciary in the area of speech and debate in the House of Representatives and the Senate.<sup>27</sup>

Section 2 of the Third Article of the Constitution provides that the judicial power shall extend to all cases in law and equity arising under the Constitution and the Laws of the United States, etc. The authority and powers of the Federal Courts stem, therefore, from the Constitution and, in making this grant of judicial power, the Constitution, the source of that power, carefully denied to the courts any authority in the area of speech and debate in the Congress.

The scope of the Constitutional prohibition depends upon the meaning of the word "question", particularly as it was used in 1789. Clearly the draftsmen of the Constitution used the word to mean "impeach" or "inquire into" or "to be the foundation of any accusation or prosecution, action or complaint".

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<sup>27</sup> "The privilege is absolute. The purpose, motive or the reasonableness of the conduct is irrelevant." Judge Youngdahl in *McGovern v. Glenn Martz and Washington News Syndicate*, 182 F. Supp. 343, 346 (D.C. D.C. 1960).



The Bill of Rights of 1689 stated that speech, or proceedings in Parliament debate "ought not to be impeached or questioned in any court or place out of Parliament." The Declaration of Rights of 1776 of Maryland provided that "speech and debate ought not to be impeached in any other court or judicature". The Bill of Rights of 1780 of the State of Massachusetts and the Constitution of New Hampshire declared that speech and debate "cannot be the foundation of any accusation or prosecution, action or complaint, in any other Court or place whatsoever". There can be no distinction in meaning between the concise language of the Declaration in the Federal Constitution and the broader language of the earlier English Bill of Rights and of the Maryland, Massachusetts and New Hampshire Constitutions. All had their source in the same historic struggle for freedom of speech in the legislative branch of Government; all were directed to the same end, to assure that freedom. In *Kilbourn* (p. 203) the Supreme Court quoted the provision of the Bill of Rights of Massachusetts, its evident purpose to make clear that, although the Massachusetts provision was broader than the concise declaration of the Federal Constitution, in meaning they were synonymous.

1. Acceptance of the Government's contention would mean that the constitutional prohibition should be narrowly interpreted to insure that it does not protect alleged criminal conduct with respect to speech or debate in the Congress. Yet, this great constitutional privilege has been universally interpreted liberally to achieve its fundamental purpose and never before has any American court attempted to qualify, condition, or limit its full constitutional scope. This principle was expounded in *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) recognized as the

leading authority on Speech and Debate by this Court in *Kilbourn v. Thompson*, 103 U.S. 168 (1881) which repeated the canon of liberal construction.

*Tenney v. Brandhove*, 341 U.S. 372, 377, involved the charge that members of a California Legislative Committee had violated a civil conspiracy law of the United States. The Court rejected the contention of the Government that the constitutional privilege did not extend to an accusation that legislative conduct was done for a dishonest purpose or in violation of a federal law. The Court said (p. 377):

“The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury’s speculation as to motives.”

2. The District Court and the Government disregard the fact that the constitutional prohibition also applies to the allegations as to the reprinting and republishing of the Johnson speech. The Court may take judicial notice that all speeches made in the House or the Senate are printed in the Congressional Record and duly published as a House or Senate document and made accessible to the public. Thus the publication of the legislative proceedings is done under the authority of the Congress. Any speech embodied in the Congressional Record becomes a public document. Public documents may be reprinted by the public printer by order of any member of Congress on prepayment of their cost. 44 U.S.C. Secs. 71, 72, 79, 82, 162, 163 and 185.

It was under these statutory provisions and the rules of the House that Johnson, as a member of the House, ordered printed copies of his speech for distribution. Since the reprinting of a public document contained in the Congressional Record is done under the authority of the Congress, that reprinting and republication are within the constitutional immunity. *DeArnaud v. Ainsworth*, 24 App. D.C. 167, 5 L.R.A. (N.S.) 174, *Wason v. Walter*, 4 Q.B. 73, 85 (1868).<sup>28</sup>

3. The decision of the Fourth Circuit interpreting the Speech and Debate clause is confirmed by the historic interpretation accorded the separation of powers doctrine. As long ago as 1810, Chief Justice Marshall, on behalf of the Supreme Court, declared in *Fletcher v. Peck*, 6 Cranch 87, 130 (without reference to Article 1, Section 6, of the Constitution), that the judiciary was not competent to inquire into the motives of the members of the legislative branch of the Government in enacting legislation or whether they acted corruptly or with self-interest or under undue influence. He even went so far as to say, "If the majority of the Legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct." (p. 130).

Since *Fletcher v. Peck*, the principle that the judiciary may not question the motives of members of the Congress has been deemed fundamental under the separation of powers doctrine. *Arizona v. California*, 283 U.S. 423, 455 (1931); *Hearst v. Black*, 87 F.2d 68, 72 (C.A. D.C. 1936); *Townsend v. United States*, 95 F.2d 352 (C.A. D.C. 1938); *Eisler v. United States*, 170 F.2d 273, 279 (C.A. D.C. 1948); *Barsky v. United States*, 167 F.2d 241, 250

<sup>28</sup> See the note by Bigelow (editor) pp. 631-32, Story, Commentaries Vol. I (5th Ed. 1891).

(C.A. D.C. 1948). The vitality of the principle was reiterated by the Supreme Court as recently as 1950 in *Tenney* where the Court reaffirmed the holding of *Fletcher v. Peck*, (p. 377) "that it was not consonant with our scheme of Government for a court to inquire into the motives of legislators, has remained unquestioned." The government has been unable to reconcile its position in this case with these landmark cases.

4. Mr. Justice Story was undoubtedly correct when he wrote in his *Commentaries on the Constitution*, Vol. I, p. 630 (5th Ed. 1891):

"The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belong to the legislation of every State in the Union as matter of constitutional right."

#### D.

#### HISTORY OF THE DEVELOPMENT IN ENGLAND OF THE PRINCIPLE OF LIBERTY OF SPEECH AND DEBATE IN PARLIAMENT CONFIRMS THE INVALIDITY OF THE CONSPIRACY CHARGE

In the Fifteenth, Sixteenth and Seventeenth Centuries the first order of business of a new House of Commons was a petition to the Crown that it recognize for the duration of the House the ancient privileges of the House, including the right of free speech.<sup>29</sup> These petitions implicitly assumed that Parliamentary privileges were a matter of grace subject to grant and limitation by the Crown.

<sup>29</sup> The History of English Parliamentary Privilege, p. 23, Carl Wittke, Ohio St. Univ. 1921.

The first significant claim that a legislator could not be punished by reason of legislative speech occurred in 1455 in the case of Thomas Yonge (Young), one of the "knights for the shire and town of Bristol." He complained to Commons that he had been arrested for a motion made by him in Commons concerning the descent of the throne. As the government correctly states (Gov't Brief, p. 20) the importance of his petition for relief was the novelty at that time of his claim that members of Commons by their ancient liberty "ought to have their freedom to speke and sey in the Hous of their assemble, without eny maner chalange, charge or punycion therefore to be leyde to theyme in eny wyse."<sup>30</sup>

Under Henry VIII the Commons began to articulate its privileges, at first hesitantly but later with increasing vigor and reliance upon precedent.

In 1512 under Henry VIII Richard Strode, a member of Commons, was prosecuted by the Crown in its Courts and fined and imprisoned for allegedly having a financial interest in a bill to regulate certain abuses connected with the tin industry. On a petition by Strode to the Parliament an act was passed in 1521 annulling his conviction and providing that in the future all suits and charges that might be brought against him and others for any bill, speaking, reasoning, declaring or any matter concerning the Parliament to be communed and treated be considered void. Section 2 of Strode's act provided that, "Sutes, accusations, condempnacions, execucions, fynes, amercramentes, punysshmentes, correccions, greivances, charges and impositions, put or had or hereafter to be put or hadde unto or uppon the said Richard, and to every other of the person or persons afore specified, that now be of this present

<sup>30</sup> Note 4 Henry VII, Ch. VIII. See also I Hatsell, 86.

parliament, or that of any Parliament hereafter shalbe for any bill, spekyng, reasonyng, or declaryng of any mater or maters concernyng the parliament to be commended and treated of, be utterly voyd and of none effect." VI Holdsworth, 98.

For a century a dispute raged whether this comprehensive enactment was a private or a public act; in 1629 the judges declaring it a private act applying only to Strode's case, but the Parliamentarians in the struggle with Charles arguing that it was a public bill applicable to all charges and suits after its enactment.<sup>31</sup> Significantly Parliament declared even then that a criminal charge as to the alleged dishonest motives of a member in introducing a bill violated the legislative privilege.

Elizabeth I imprisoned members of the Commons for words spoken in that House although Holdsworth states that "Strode's act was really decisive that it was not legal."<sup>32</sup>

In 1576 during the reign of Queen Elizabeth, Peter Wentworth made his great speech in the House of Commons and there for the first time the claim was made that freedom of speech had a fundamental, entrenched place in the Constitution, entirely removed from its historic status as a privilege dependent upon the grace of the Crown and subject to definition by it.<sup>33</sup> Among other things Wentworth said:

"Mr. Speaker, I find written in a little volume these words in effect: 'Sweet indeed is the name of liberty and the thing itself a value beyond all inestimable

<sup>31</sup> *Histroy of English Parliamentary Privilege*, p. 25.

<sup>32</sup> VI Holdsworth, p. 98; IV Holdsworth, p. 179.

<sup>33</sup> Elizabeth I and Her Parliaments, p. 321, J. E. Neale (Jonathan Cape, 1953).

treasure.' So much the more it behoveth us to take heed lest we, contenting ourselves with the sweetness of the name only, do not lose and forgo the value of the thing. And the greatest value that can come unto this noble realm . . . is the use of it in this House . . .

"I was never of Parliament but the last and the last session (i.e. 1571 and 1572), at both which times I saw the liberty of free speech, the which is the only salve to heal all the sores of this Commonwealth, so much and so many ways infringed, and so many abuses offered to this honorable Council . . . that my mind . . . hath not been a little aggrieved . . . Wherefore, to avoid the like, I do think it expedient to open the commodities that grow to the Prince and whole State by free speech used in this place . . ."

\* \* \*

"I conclude that in this House, which is termed a place of free speech, there is nothing so necessary for the preservation of the Prince and State as free speech, and without it it is a scorn and mockery to call it a Parliament House, for in truth it is none, but a very school of flattery and dissimulation, and so a fit place to serve the Devil and his angels in and not to glorify God and benefit the Commonwealth . . ."

"Free speech and conscience in this place are granted by a special law, as that without the which the Prince and State cannot be preserved or maintained."

\* \* \*

"It is a great and special part of our duty and office, Mr. Speaker, to maintain freedom of consultation and speech . . . I desire you from the bottom of your hearts to hate all messengers, tale-carriers, or any other thing, whatsoever it be, that any manner of way infringe the liberties of this honourable Council. Yea, hate it or them, I say, as venomous and poison unto our Commonwealth, for they are venomous beasts that do use it."



It has been said that this was the most remarkable speech hitherto conceived in the Parliament of England. "No one—at least, we know of no one—had previously thought these questions fearlessly through to the simplicity and clarity of Peter Wentworth's conclusions. He was wrong, utterly wrong in his own generation; but the future hallowed his doctrine. He, indeed, as much as any of his colleagues, shaped that future."<sup>34</sup>

When Wentworth was called to account by a committee appointed by the House, including all Privy-Councillor Members and other officials, and interrogated as to his motives in using abusive language with respect to Queen Elizabeth, he took the position that, if the committee was acting on behalf of the Crown, he would refuse to answer any questions because they had no right to interrogate him; but, if they were acting as a committee of the House, they had such authority and he would willingly answer.<sup>35</sup> Wentworth was convicted and imprisoned in the Tower.

If many members of the House of Commons were creatures of the Crown, if a majority was often too readily intimidated, if Wentworth was only feebly supported, there were some "who with patient resolution and inflexible aim recurred in every session to the assertion of that one great privilege which their sovereign contested, the right of Parliament to inquire into and suggest a remedy for every public mischief or danger" IV Holdsworth 180. In each of the Parliaments of 1584, 1585, 1586, 1587 and 1588 a committee of the House was appointed to bring to the notice of the House cases of the breach of their privileges there. Holdsworth suggests that this was a "significant sign of the times" and "the importance of safeguarding

<sup>34</sup> Elizabeth I and Her Parliaments, p. 325.

<sup>35</sup> Elizabeth I and Her Parliaments, p. 326.

of the privilege of freedom of speech was never lost sight of.<sup>36</sup>

It is not surprising to find that the earliest controversies between James I and his Parliaments turned upon questions of privilege, and these questions were in the forefront of the constitutional controversies all through this period.<sup>37</sup>

In James I's first Parliament in 1604 the House of Commons laid it down in clear terms that the privileges of Parliament were as much their "undoubted right," as the right of property which every subject had in his lands or goods; and that these privileges being necessary for the conduct of the business of the House, they could not be "withheld, denied, or impaired, but with apparent wrong to the whole estate of the realm."<sup>38</sup>

When James thereafter imposed custom duties without parliamentary consent, commanding Commons not to challenge the Crown's prerogative in this matter, Commons responded that it was "an ancient, general, and undoubted right of Parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved."

Neither James I nor Charles I would admit the truth of this view as to the nature and basis of Parliamentary privilege. In 1621 James I told the House of Commons that in his opinion these privileges were not their ancient and undoubted right, but on the contrary, were derived "from the grace and permission of himself and his ancestors"; "for," he said, "most of them grow from

<sup>36</sup> VI Holdsworth, 179, 180.

<sup>37</sup> VI Holdsworth, p. 93.

<sup>38</sup> VI Holdsworth, p. 93.

precedents, which shows rather a toleration than inheritance." Further, he warned that if they persisted in trenching upon his prerogative, he would be forced to trench upon their privileges.<sup>39</sup>

The House of Commons lost no time in contradicting James in the most decided way. Its famous Protestation of 1621 ran as follows:

"The testation following: that the liberties, franchises, privileges, and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the king, state, and defence of the realm, and of the church of England, and the maintenance and making of laws, and redress of mischiefs and grievances which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses *every member of the House of Parliament hath and of right ought to have freedom of speech, to propound, treat, reason, and bring to conclusion the same: and that the Commons in Parliament have like liberty and freedom to treat of these matters in such order as in their judgments shall seem fittest: and that every member of the said House hath like freedom from all impeachment, imprisonment, and molestation (other than by censure of the House itself) for or concerning any speaking, reasoning, or declaring of any matter or matters touching the Parliament, or Parliament business . . .*".  
(Emphasis added.)

James was so enraged at this protestation that he sent for the Journals of the House of Commons, and tore it out with his own hand.

<sup>39</sup> Chrimes, *English Constitutional History* (1953) 144-145; Letter of the King, Dec. 1621, Prothero, Documents, 313; VI Holdsworth, p. 93.

In 1629, by Order of Charles I, Sir John Eliot, Denzil Holles and Benjamin Valentine, members of the House of Commons, were prosecuted in the Court of Kings Bench, after Parliament's dissolution, for speeches made in the House which the Crown deemed criminal and seditious. The accused pleaded to the jurisdiction of the Court, maintaining that the offense, if any, had been committed and was punishable only in Parliament and not elsewhere. "Words spoken in Parliament . . . cannot be questioned in this court \* \* \*."<sup>40</sup> The King's Bench convicted the members of the House and imprisoned them, Judge Sir William Jones observing: "We are the judges of their lives and lands; therefore of their liberties."<sup>41</sup> Eliot died from the effects of his imprisonment in the Tower.

In a MS. speech written by Eliot for a Parliament, which he did not live to see (Forster, *Life of Eliot*, ii 445-448) he wrote at p. 466, "Now the whole power and virtue of Parliament depends upon the privileges thereof. Her ancient franchises and immunities are that which has sustained her. A Parliament without liberty is no Parliament." In 1640 members of the Commons were questioned by the Privy Council as to their legislative conduct and imprisoned for their refusal to reply. Macaulay, *1 History of England*, p. 96 (Lovell, Ed.).

The decision of the King's Bench in the Eliot case contributed greatly to the growing opposition to Charles, and the Commons never forgot this unwarranted invasion of their privileges. In 1641, the earliest opportunity they had, the Commons adopted resolutions declaring these entire proceedings against their members a breach of Parliamentary privilege. The Civil War prevented further action but after the Restoration, the

<sup>40</sup> 3 Howell, State Trials, 296.

<sup>41</sup> 3 Howell, St. Tr. 306.

case was reopened and on November 12, 1667, the House of Commons, to remove all possibility of misunderstanding in the future, adopted a resolution declaring Strode's Act of 1521, attempting to guarantee freedom of legislative speech and action, a general law declaratory of the "ancient and necessary rights and privileges of Parliament."<sup>42</sup> On November 23, 1667, the Commons declared the specific judgments against Eliot and the other members illegal and breaches of privilege, and later the Lords ordered the judgment of the King's Bench reversed.

In 1642 Charles I sent his Attorney General to charge Pym, Hollis, Hampton and other members of the House with high treason in the House of Lords and Charles went in person with armed men to arrest them in Parliament. This action of the Crown was caused by legislative acts and utterances, including a remonstrance of the Commons in November 1641 enumerating the faults of the Charles Administration. I Macaulay p. 107. It triggered the Civil War. After the Restoration the principle of legislative liberty was so established that Charles II did not dare to attack it directly; his men did mutilate Sir John Coventry for his utterances. I Macaulay p. 191.

Immediately after the Revolution of 1688, Parliament enacted the Bill of Rights of 1689 (I Will & Mary Sess. 2, C.2) providing:

"that the freedome of speech, and debates, or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

In 1689 the House of Commons summoned two Judges of the King's Bench to its bar to answer for a judgment they had given adverse to the claim of the privileges of the lower House involving matters other than the freedom

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<sup>42</sup> The History of English Parliamentary Privilege, p. 30.

of speech. After hearing their defense, the Commons resolved that Judge Pemberton and Judge Jones by "giving judgment to overrule the plea to the jurisdiction of the Court of King's Bench . . . had broken the privileges of the House" and for their breach of privilege they were ordered into custody.<sup>43</sup>

The vigorous assertion of Parliamentary privilege by the House of Commons and its establishment in the Bill of Rights did not mean that improprieties as to speech or debate committed by members of the House went unpunished. An offer of a bribe to, or its acceptance by, a member of Parliament for any matter connected with his parliamentary duties was deemed an insult to Parliament. Even as early as the Seventeenth Century the House of Commons repeatedly sat as a tribunal to hear charges that its members had accepted bribes.<sup>44</sup>

It has been accurately said by one authority that "after the Revolution of 1688 and the consequent Bill of Rights, the privilege of freedom of speech and debate in Parliament was never again seriously questioned or denied."<sup>45</sup> Ever since, for almost 300 years, freedom of speech has protected members of Parliament from any civil or criminal proceedings with respect to speech or debate by the Crown or the courts and we have found no case in England since that against Sir John Eliot in 1629 where the Crown has

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<sup>43</sup> 3 Howell, St. Tr. 331 et seq.

<sup>44</sup> One in 1694, 11 C.J. 274, 5 Parl. His. 900; two in 1695, 11 C.J. 283, 5 Parl. His. 910; and one in 1697. On May 2, 1695, Parliament declared that to offer a bribe to a member of Parliament should be deemed a high crime and misdemeanor, an insult to the member and to the House. The resolution assumed that the tribunal of the House of Commons had sole jurisdiction to hear and convict upon such a charge. *Parliamentary Practice* (12 ed. 1917), p. 85.

<sup>45</sup> *History of English Parliamentary Privilege*, p. 30, 32.

attempted to impeach a speech by way of a conspiracy charge or otherwise.<sup>46</sup>

The entire course of constitutional history of parliamentary privilege in England indicates that the great privilege of speech and debate was intended to free members of the legislative branch from any inhibition caused by fear of prosecution from the Crown stemming from any utterances in Parliament. This history in no way supports the refined distinction between an antecedent agreement to make a speech and the speech itself asserted by the government. Everything said by Wentworth, Eliot, and others denies the distinction. Everything said by the House of Commons in Strode's Act, its Protestation of 1621 and its Resolution of 1667 making clear that Strode's Act was a general law reject the distinction.

In Strode's Act the issue was the effect of Strode's personal interest in the object under debate—an interest antecedent to the introduction of his Bill. In *Ex Parte Wason*, as here, a conspiracy was charged with respect to an agreement antecedent to speech in Parliament. Parliament in Strode's Act and the Queen's Bench in *Wason* held that the historic speech and debate privilege precluded any inquiry by the Crown or the Courts in such matters.

The historic purpose of the speech and debate provision was to prevent any inhibition of members of Parliament with respect to speech or debate. The history of the privilege confirms the view that merely to label the prosecution a conspiracy with respect to the motivation of a speech—an alleged antecedent agreement to make it—would be no less chilling, no less inhibiting than a direct prosecution by the executive power for the content of

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<sup>46</sup> The criminal charge in *Wason* (p. 50-51 herein) was not instituted by the Crown.



speech. Thus the history of the speech and debate clause confirms that it was never designed to admit of the qualification now sought by the government for the first time since the Bill of Rights in 1689.

### III

## THE CONTENTIONS OF THE GOVERNMENT

### A

#### THE GOVERNMENT'S CONTENTION THAT ARTICLE I, SECTION 6 OF THE CONSTITUTION PROTECTS ONLY CONTENT OF A SPEECH WOULD DESTROY THAT PROVISION

Throughout its brief the government argues that, while the Speech and Debate clause prohibits prosecutions founded upon the *content* of a speech delivered in Congress, it permits a prosecution founded upon an alleged criminal antecedent agreement which motivated the speech. This unprecedented distinction suggested by the government is at war with the turbulent history and the basic policy of the privilege.

1. The government's attempted distinction between a criminal charge based upon an antecedent agreement and one based upon the content of a speech is disingenuous in view of the requirements of the conspiracy statute involved in this case and the government's attempt to meet those requirements in the indictment and at trial. The conspiracy statute, 18 U.S.C. 371, requires as an essential element of the offense of conspiracy to defraud the United States not only an antecedent agreement, but also an overt act in furtherance of the conspiracy. The overt act central to the conspiracy indictment against Johnson was overt act number 4:

"On or about June 30, 1960, in the District of Columbia the defendant THOMAS F. JOHNSON delivered a speech on the floor of the House of Representatives" (App. p. 10).

It cannot be doubted that the proof of this overt act and proof that it was in furtherance of the conspiracy required an inquiry into the content of the speech. *Except for the fact that the content of the speech supported state savings and loan associations* it was not possible for the government to meet its burden of showing that this overt act was in furtherance of the conspiracy. If Johnson had made a speech in the House on June 30, 1960, but it related to foreign policy or constituted an attack upon state savings and loan associations, its content would have denied the charge. Likewise, proof of overt acts 1, 2, 6 and 7 charged in the indictment and proof that they were in furtherance of the conspiracy necessitated an inquiry into the content of the speech delivered by Johnson.

The antecedent agreement charged by paragraph 15 of the conspiracy charge was an alleged agreement by Johnson to make a speech in the House of Representatives *defending state savings and loan associations*. This charge involved the content of speech and required an inquiry into its content.

The transcript of the testimony at trial indicates that a searching inquiry into the motivation, source of material, preparation, content and use of the speech was made by the government. (*For example see Kunkle, App. 258-260; Wyckoff, App. 205-206; Kiernan, App. 254; Buarque, App. Vol. III, 36-43; Heflin, App. 180-191; Rains, App. 149-150 and Johnson, Tr. 3785-3831.*<sup>47</sup>) Thus, even were this Court

<sup>47</sup> Interrogation of Johnson included these questions:

Asst. U.S. Attorney Marion: "Now your speech was finally de-

to accept in principle the distinction asserted by the government, it could have no relevance to the prosecution of Johnson.

2. The history of legislative liberty emphatically repudiates the restrictive interpretation claimed by the government. That history makes clear that its prohibition was intended to enable the elective branch of the government to be free from any possibility that they be degraded, intimidated, discredited or oppressed by any criminal charge by the executive power with respect to legislative speech or debate. As Blackstone said "The privilege of Parliament was principally established in order to protect its members not only from being molested by their fellow subjects but also more especially from being oppressed by the power of the Crown."<sup>48</sup>

"Article I of the Constitution, in saying of members of the Senate and House alike that "for any Speech or Debate . . . they shall not be questioned in any other place," was intended mainly to prevent harassment of legislators by the Executive authority as Parlia-

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livered or submitted to the clerk and it was printed in the Congressional Record, and it stresses the value of commercial mortgage guaranty insurance, does it not?" (Tr. 3805).

Asst. U.S. Attorney Marion: "Congressman, do you mean to tell the jury that Mr. Buarque put that language in the speech about three indicted institutions and none convicted, and you did not inquire as to which particular institutions they were?" (Tr. 3805).

In argument to the jury government counsel said "Congressman Johnson claimed under oath, Member of the Jury, that he did not even bother to check the facts to ascertain whether he could truthfully make such a statement in his speech.

"If so, I submit to you, it was utterly and completely irresponsible and reprehensible. . . ." (Tr. 5839).

<sup>48</sup> Blackstone, *Commentaries*, ch. 2, p. 164, also Holdsworth, *History of English Law* (1924), vol. 6, p. 231.

ment once protected itself from such harassments by a King.<sup>49</sup>

As we have shown, the leading case in England in the 16th Century—*Strode's Case* of 1512—did not involve the content of utterances in the House of Commons. On the contrary, Strode was charged by the Crown in the King's Bench with having a financial interest in a bill introduced by him in the House, such financial interest being antecedent to his legislative action. In 1521 Parliament annulled his conviction in its famous *Strode's Act* which attempted to deny to the Crown any authority to make any criminal charge of any kind with respect to speech or debate or other legislative action of a member of the House of Commons. Thereafter it was the firm position of the Parliamentarians that *Strode's Act* was a general act applicable to any accusation by the Crown with respect to legislative speech or action. After the Civil War and the Restoration in 1667 the House of Commons formally adopted a resolution declaring *Strode's Act* of 1521 attempting to guarantee freedom of legislative action a general law declaratory of the "ancient and necessary rights and privileges of Parliament." Thus the most significant case in the history of the development of legislative freedom, ultimately established by the Bill of Rights of 1689, was not related to the *content* of speech in the House of Commons and *Strode's Acts* of 1521 and 1667 were directed at nullifying all executive and judicial action which attempted to question the alleged criminal motivation of legislative speech and action.

In *Ex Parte Wason* 4 QB. 573 (1869) the Queens Bench held that it had no jurisdiction of a conspiracy charge that an allegedly unlawful antecedent agreement had been made

<sup>49</sup> William S. White, *CITADEL, The Story of the U.S. Senate* (1956), ch. XIX, p. 265.

relative to speech in the House of Lords. Thus the Court rejected the very contention made by the government here. The language of Cockburn, C.J., in *Wason* is equally applicable to Johnson:

"... Mr. Wason charged and proposed to make the substance of the indictment, that these three persons did conspire to deceive the House of Lords by statements made in the House of Lords for the purpose of frustrating the petition. Such a charge could not be maintained in a court of law. It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy (i.e. the antecedent agreement) to make such statements would not make the persons guilty of it amenable to the criminal law . . .".<sup>50</sup>

As Blackburn, J., stated:

"I perfectly agree with my Lord as to what the substance of the information is; and when the House is sitting and statements are made in either House of Parliament, the member making them is not amenable to the criminal law. It is quite clear that no indictment will lie for making them, nor for a conspiracy or agreement to make them, even though the statements be false to the knowledge of the persons making them. I entirely concur in thinking that the information did only charge an agreement to make statements in the House of Lords, and therefore did not charge any indictable offence."

The historic background of the speech and debate privilege, i.e. the struggle between the House of Commons and the Crown culminating in bloody civil war, makes it un-

<sup>50</sup> In its brief the government has misread *Wason* and quotes one sentence out of context from the quotation above (Gov't Brief p. 25).

deniably clear that the fundamental purpose of the privilege was to protect, not the content of speech, but the speakers themselves and indeed the entire legislative body from criminal prosecution by the Crown with respect to any and all utterances and their purposes in the legislative chamber.

Everything said by the Parliamentarians, Wentworth, Eliot, and others is a denial of the qualification sought by the government here that the speech and debate provision of the Bill of Rights did not apply to the alleged criminal motivation of legislative speech and everything said by the House of Commons in Strode's Act of 1512, in its Protestation of 1621 and in its second Strode's Act of 1667 make clear that speech and debate in Parliament, including content and motivation, could not be the foundation of any criminal charge by the Crown. *Wason* confirmed this conclusion.

The very fact that since the enactment in 1512 of Strode's Act, the Crown has never charged a criminal conspiracy with respect to speech in the House of Commons,<sup>51</sup> although the Star Chamber had created the offense of conspiracy, best indicates that the Crown and its legal advisers have been ignorant for over 400 years of the qualification now claimed by our government, namely, that the ancient privilege with respect to speech and debate claimed by Parliament did not extend to the alleged criminal motivation of speech there. The purported discovery by the executive power of the United States in 1965 of such an attenuated distinction comes too late.

3. The ultimate purpose of the Speech and Debate clause of our Constitution, as in the case of the Bill of Rights, was to encourage the utmost freedom of speech by any member

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<sup>51</sup> In *Wason* the charge was not made by the Crown.

of the legislative branch of the government by precluding any inquiry, any investigation and any criminal charge with respect to the motivation or content of words spoken in the legislative chambers. To preclude the possibility of a baseless criminal charge which might intimidate and restrain freedom of speech, the Bill of Rights and later Article 1, Sec. 6 of our Constitution denied any authority to the executive power to make any charge with respect to speech, its purpose, or its motivation. *Tenney*, p. 377.

It is not the philosophy of the Speech and Debate clause to remove all possible sanctions against the legislator. His constituents, his business associates, his friends, the press and the public all have "coercive" power. Even the executive branch of the government is not helpless if it believes that a legislator has been faithless to his trust, with respect to speech in the Congress. It may refer the evidence of impropriety to the House or Senate. It may criticize and even castigate. But the executive has no jurisdiction to institute criminal proceedings with respect to the motivation of any utterances made in the legislative chambers and the judiciary has no jurisdiction to try such proceedings.

4. If the founding fathers had intended that the constitutional provision be narrowly interpreted, as the government contends, it may be assumed that they would have said so and in such event the provision would have read: "*for the content* of any speech or debate in either House, they shall not be questioned in any other place" or "*for any speech or debate in any House which is not made for a criminal purpose*, they shall not be questioned in any other place."

5. The government contends that the objective of the privilege to promote the independence of the legislature



would be subverted if the privilege could be used to protect the legislator "in the very act of forsaking that trust in favor of a private allegiance" (Gov't Brief, p. 27). In our discussion of *Tenney* we showed that the test of the application of the constitutional prohibition may not depend upon whether the executive claims a dishonest or criminal purpose because that prohibition is not cast in terms of propriety or impropriety, or rightful or wrongful conduct; on the contrary its prohibition is absolute. The question is not whether a member of Congress should be punished for a venal or otherwise improper speech but by what tribunal this shall be done—the House, the Senate or the Courts. Article 1, Section 6 directs that it may be done only by the House or Senate.<sup>52</sup>

6. Practical considerations point up the illusion of the government's attempt to distinguish between the content of speech and an alleged antecedent agreement giving rise to the speech. It is not realistic to believe that any prosecution would ever occur without regard to the content of a particular speech. One cannot visualize a criminal charge involving the relationship of a speech in the Congress and a gift or political campaign contribution in the case of any well known leader of a national political party because such a charge would be promptly labeled a political perse-

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<sup>52</sup> Nor is the power of the Congress to punish a member for unethical conduct inadequate. Either House is empowered by Article I, Section 5 to punish a member for disorderly behavior and by a vote of 2/3rds to expel a member. The power to punish extends to all cases where the offense is deemed inconsistent with the trust and duty of the member and in a proper case a member may be imprisoned. *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Re Chapman*, 166 U.S. 661, 669 (1897); *Marshall v. Gordon*, 243 U.S. 521, (1917); *McGrain v. Daugherty*, 273 U.S. 135, 172 (1927). The possibility that the Congress may abusively or oppressively exercise a constitutionally granted authority affords no ground for denying the power. *McGrain v. Daugherty*, p. 175.

ention. Only the obscure or the obnoxious would need to fear the heavy hand of executive power. The innovator and the radical speaking against the current and strongly held majority view would be the most likely objects of such a conspiracy charge. It is to be doubted that a conspiracy charge involving speech in Congress would be initiated or could be sustained where a Congressman, who is a member of one of the two major parties spoke in support of the position of his party. It would be too much to expect the prosecution of a member of Congress who spoke in support of presidential policy. It is beyond belief that a Congressman would be claimed to have conspired to make a speech for compensation calling for the creation of a national cultural center, or calling for a change in the color of service uniforms, or calling for the inscription of the Lord's Prayer on the capitol steps, or calling for the adoption of the chrysanthemum as the national flower. But when a speech is made in favor of the "wrong", the unpopular, side of a hot political "potato", as in this case, then a prosecution would be more likely to be made by the executive power and more likely to be successful. Thus the content of a speech and a criminal charge of conspiracy are not separable.

7. In their arguments to the jury government counsel contended that Congressman Johnson must have been influenced in giving his speech by the \$500.00 campaign contribution he received from Robinson, and in its brief in the Fourth Circuit the government stated that "the government certainly did not have to prove that the Congressman's *sole* motive in giving the speech was to receive compensation or to aid Edlin or Robinson . . ." (Gov't Brief in the Fourth Circuit p. 32). Thus the prosecution correctly confessed that under the conspiracy charge it was not necessary even to prove an antecedent agree-

ment with respect to the speech or that it was even necessary for the government to establish that Johnson was employed, or even consciously agreed, to make a speech for a campaign contribution. According to the government's view, in which we concur, all that was necessary was for the jury to find that in making his speech Congressman Johnson was influenced in part by a campaign contribution made 10 days before he spoke or by a wish to aid Edlin or Robinson.

8. The cynicism of the government's position is best indicated by the fact that historically the greatest corrupter of the legislative branch of the government has been the executive power. "William, like Charles II and James II had found that it was necessary to corrupt the House of Commons in order to manage it."<sup>83</sup> The government accurately refers to numerous efforts made by the Crown and its ministers, including George III and Walpole, to bribe members of Parliament (Gov't Brief, p. 27, 28). We know that even today members of Congress are rewarded or punished by the executive power. They are rewarded for their support and punished for their opposition by the granting and withholding of patronage or presidential favor. Is it conspiracy to defraud the government of his faithful services for a member of Congress to make a speech defending the position of the administration with the understanding that a supporter will receive a lucrative administrative position? Is "compensation" limited to a money gift or a political campaign contribution, or is compensation to be deemed to include the benefits of presidential favor? Yet it would be too much to expect the Attorney General to attack his own employer by seeking an indictment in such circumstances.

9. The comparatively slight burden of proof upon the

<sup>83</sup> *History of English Law*, VI Holdsworth (Metheun, 1924) p. 246.

government under Section 371 is an important factor for consideration in determining whether a Section 371 conspiracy charge relative to speech in the Congress is prohibited by the Speech and Debate provision. Any member of Congress confronted with such an accusation upon mere proof of the gift and the speech must explain his purposes in making the speech and demonstrate that he was not influenced by the gift. This case illustrates the grave dangers involved in a conspiracy charge leveled at the motivation of speech delivered in Congress. As the Fourth Circuit pointed out, the end result was an inquisition into Congressman Johnson's motivations (337 F.2d 189, 204), a disgraceful inquiry in which he was compelled upon direct examination and cross-examination to give the Court and jury a detailed explanation of his thoughts and purposes with respect to his speech. This inevitable and shocking procedure could not but have chilling effects on the freedom of expression of every other member of the Congress.

10. The government attempts to separate the inseparable when it claims that it was not challenging the content of the speech but only its venal purpose. The motivation of speech or debate is so related to content they are indistinguishable for no words are spoken or written without purpose. When the Tudors, Charles I and James I leveled their charges of treason and sedition against members of the Commons for their legislative utterances, intent was an inherent element of the offense. A speech has no meaning without reference to its motivation and the effort of the government to distinguish between an attack upon the spoken word and an attack upon the criminal purpose of the word involves sophistry as well as an invitation to the emasculation of the constitutional principle.

Modern psychology teaches that the motivation or causation of any human action involves a difficult, complicated, perplexing inquiry. Human action is subject to unconscious as well as conscious influences involving the life of the individual, his environment and his personality.<sup>54</sup> This must be particularly true of human utterances. For a jury to be permitted to speculate with respect to the causation of a particular utterance in the Congress, i.e., whether a speech there was caused or influenced by a political campaign contribution, would require it to be gifted with a talent even unclaimed by the philosopher, psychologist or psychiatrist.

11. The government postulates the hypothetical situation of a criminal agreement to make a speech when the speech is not in fact delivered. It then argues that in that case a charge of conspiracy to defraud would not be barred by Article 1, Section 6 (Gov't Brief, p. 11, 18). The theoretical nature of such a situation is indicated by the obvious fact that in such a case a conspiracy charge would be almost impossible to initiate or to sustain. Indeed it is inconceivable that in such a situation a successful prosecution could be maintained. This hypothesis does not rise to a constitutional level because, if there is no speech or debate to be questioned, the constitutional privilege is not involved. On the other hand, when a congressional speech, allegedly the object of an unlawful agreement is made, the danger is ever present, real and substantial, that the charge of an unlawful agreement is merely a front for an actual attack on the speech and thus nothing less than a

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<sup>54</sup> Edward B. Titchner, *A Textbook of Psychology*, p. 468 (N.Y. 1913); W. S. Taylor, *Dynamic and Abnormal Psychology*, p. 82, 86, 88, 400, 401, 409, 410 (N.Y. 1954); Gardner Murphy, *Personality. A Bio-Social Approach to Origin and Structure*, p. 88, 89, 127 (N.Y. 1947); R. F. Peters, *Concept of Motive*, (London 1965).

devious (or at best ingenuous) attempt to circumvent the provisions of Article I, Section 6.

12. The government's dislike for Article 1, Section 6 has caused it to suggest an interpretation of the Speech and Debate clause, which if accepted, would emasculate, if not destroy, that privilege. Under its interpretation even an untruthful speech could qualify as a "defrauding of the government" under Section 371 as construed by the government and the District Court. The antecedent agreement to make the false speech would be the conspiratorial agreement under Section 371. The speech would qualify as the overt act required by Section 371. In such a case government counsel could say, as they do here, that the content of the speech was not under attack. Thus, the Speech and Debate clause would seem to lose all vitality if the government's view of that clause were accepted.

13. Article 1, Section 6 is founded on the assumption that our system can tolerate or countenance sin at least to the extent that we deny a judicial remedy in the limited area of speech and debate. It is this nation's view that in the long run our governmental system will benefit from the unrestrained, uninhibited speech of legislators who have no reason to fear that the system can turn on them for their utterances in that most dreaded way, criminal prosecution. Such an assurance is only possible when the privilege is available to those whom the executive suspects of guilt as well as to those who are believed innocent of any wrongdoing. If the privilege does not have this meaning, it is without value. This Court made this perfectly clear in *Tenney*. If the government is free to charge that a speech delivered on the floor of Congress was motivated by a money payment the high objective of the privilege is not satisfied. A pall of fear would hang over the Congress. The price of such curtailment would be more than society

can afford to pay. Once this is recognized it becomes readily apparent that the government's argument that the "agreement" to make a speech and the content of the speech should be distinguished in determining the scope of the privilege is nothing short of constitutional heresy.

14. In determining whether the Fourth Circuit was correct in holding that this conspiracy charge violated the Speech and Debate provision of the Constitution, this Court in the final analysis must make a choice of values. On the one hand is the litany of the government that there should be no barrier to the criminal prosecution of a member of Congress for agreeing to make a venal speech and the needs of society demand prosecution and punishment. History records that there has never been a criminal charge by the Crown in a court of England with respect to legislative speech since the case of Sir John Eliot in 1629 and none in the annals of the federal and state courts of this country before this case. The very fact that there has never been such a prosecution in almost 350 years best indicates that there has been no social need for it. Members of the legislative branch of the government are subject to prosecution for every act (excluding speech and its motivation in the Congress) made a federal or state offense. In the tight limited area of legislative speech and debate history does not suggest that numerous legislative wrong-doers have been escaping punishment for venal speeches.

Even if the government could demonstrate that it was socially desirable that the maker of a venal speech in the Congress be prosecuted by the executive and be punished by the judiciary upon the assumption that criminal prosecution is the panacea for all sin, that social good is far outweighed by other values.

There are no crying social demands that the Speech and



Debate provision of the Constitution be narrowly construed, curtailed or emasculated. No legal or other scholar has ever advocated it; no member of the Senate or the House has ever proposed the possibility. Thus the government has failed to establish that there is a recognized social benefit in restricting the Speech and Debate clause.

15. The only way the Government could even attempt to question this speech or any other speech made in the Congress is by way of a charge under this Section 371 conspiracy statute. The collaboration by a member of Congress with others in the making of a speech, the making of a speech in the Congress due to self-interest or for personal gain and the distribution of copies of a speech are not substantive offenses under any criminal law of the United States. The Government and the District Court conceded that the constitutional provision precludes the Government from making a charge of treason, sedition or criminal libel with respect to a speech made in the Congress. Yet, this concession is meaningless because the constitutional definition of treason precludes any charge of treason from being leveled at speech or debate; there have been no sedition laws in the United States since 1800; and there has never been a federal criminal libel law. Thus, the Government's interpretation of the limited scope of this historic constitutional principle, if accepted, would effectively sterilize it from any utility or significance in the world in which we now live because the executive would be free to charge, and the judiciary to hear, an accusation that a member of Congress conspired to defraud the Government by making a speech in the Congress pursuant to an "antecedent agreement."

THE CONTENTION OF THE GOVERNMENT AS TO THE FEDERAL  
BRIBERY STATUTE IS WITHOUT SUBSTANCE

Throughout its brief the government assumes that this case involves the constitutionality of the federal bribery statute rather than the validity of the conspiracy charge under Section 371.

The federal bribery statute made it an offense for one to give to a member of Congress, and for a member of Congress to accept, a bribe to influence "his action, vote or decision" "on any question, matter, cause or proceeding which may at any time be pending in either House" (18 U.S.C. Sec. 205; revised in 1962 as Sec. 201).<sup>55</sup> The government did not charge Mr. Johnson with violating this statute or with conspiracy to do so. Accordingly any consideration by the Court of its validity would violate two of the Supreme Court's most frequently repeated canons of constitutional decision. A constitutional question is not decided when it is not necessary for the Court to do so. The Court will not decide a constitutional question which upon the facts is not presented for decision.

The government could not have charged Mr. Johnson with violating the federal bribery statute or conspiring to do so, because its terms limited the offense to official action, vote or decision with respect to pending matters. The speech, which Mr. Johnson made in the House of Representatives was unrelated to any proposed legislation or to any other matter pending in the House. His speech could not be deemed a vote, decision or other official act with respect to pending matters.

<sup>55</sup> It is significant also that all statutes forbidding the acceptance of bribes by members of state legislatures carefully refrain from including in their proscription speech or debate.

The government could not have charged Mr. Johnson with violating this statute or conspiring to do so for the additional reason that the statute carefully refrained from including speech or debate in the proscribed conduct. The cardinal principle that a penal statute must be narrowly interpreted would preclude the Court, in interpreting this statute from extending it to include speech or debate especially when the great tradition of legislative liberty has for so long protected utterances and their motivation in legislative chambers. *Tenney*, p. 377.

An analysis of the government's assumption that the federal bribery statute is at the heart of this case and that to undermine its applicability to members of Congress would be dire makes clear that the statute affords the government no aid either directly or by way of analogy.

1. There never has been a conviction of a member of Congress under the bribery statute; indeed so far as we can ascertain there has never even been a prosecution. Thus the constitutional plan of remitting Congressional discipline to the respective Houses historically has had the continuing acquiescence of the executive power. Perhaps as the government suggested in its petition for certiorari (p. 7) the decision in this case will promote the concentration by Congress on its problem of self-discipline which is the corollary of its constitutional prerogative.

2. The only relevance of the bribery statute we can perceive in this case is that, in contrast to the defrauding provision of Section 371, it indicates a Congressional intention to apply its sanction to the vote of a Congressman. In contrast, Section 371 clearly does not apply to anything which could be denominated Speech or Debate. Thus if the bribery statute has any pertinence, it tends to confirm our showing at pages 70 to 76 herein that Section 371 was never intended to apply to speech or debate in Congress.

3. Since neither the constitutionality nor any other aspect of the bribery statute is involved in this case, speculations about the validity of that statute, including the government's, are futile. Suffice it to say that the notion of the government that the decision of the Fourth Circuit, holding the conspiracy charge violated the Speech and Debate provision of the Constitution, casts doubt upon the validity of the bribery statute is not correct. Doubt as to the validity of the bribery statute was created by the decision of this court in *Kilbourn* in 1881 and in *Tenney* in 1951 holding that the Speech and Debate provision applied to *all* official acts of members of Congress. A decision that the Speech and Debate provision of the Constitution applies to the motivation and content of speech in the House of Representatives could not have any effect upon the validity of the bribery statute as applied to a vote or other official conduct within its proscription.

## C

### THE OTHER CONTENTIONS OF THE GOVERNMENT HAVE NO MERIT

1. The government argues that the guarantees of a fair trial in the Federal Constitution make a judicial forum of a conspiracy charge with respect to speech in the Congress more attractive than a legislative one. (Gov't Brief pp. 36-37). This approach would have been permissible argument in the Constitutional Convention of 1787 in opposition to the Speech and Debate clause. It has been foreclosed by the enactment of that clause and by its interpretation by this Court in *Kilbourn* and *Tenney*.

Some of the factors which made the resolution of the argument by the Constitutional Convention the appropriate one are illustrated by the case at bar. In a contest which

became the focus of local mass media for 2½ months the norms of a judicial trial certainly were not as protective as those of a legislative forum where the perception and understanding of colleagues would have promoted appreciation of the realities of the situation. Likewise, the outcome of a judicial trial is not necessarily more safeguarded from factors extraneous to the dictates of justice than a legislative trial would be. The facts of this case—the timing of the indictment 3 weeks before the election, the indefinite character of the conspiracy charge, the intense competition between state savings and loan associations and Federal savings and loan associations throughout the country, the witnesses, the publicity, and the nature of the trial all suggest that a court trial may become a dangerous vehicle quite as readily as may a legislative inquiry.

2. The government claims that the cases interpreting the scope of the *judicial* privilege make it clear that a judge cannot be held liable for the content of any judicial opinion but a judge is not immune from a charge of accepting a bribe in exchange for an opinion, judgment, or decree. (Gov't brief 11-13) Neither the policy nor the scope of the judicial privilege are even remotely comparable to that of the legislative privilege.

First there is no constitutional provision in the judicial area equivalent to the speech and debate clause which, as to legislative speech, states in unequivocal terms that it may not be questioned outside the Congress. The presence of an explicit constitutional provision as to legislators and its absence as to judges offers a clear distinction between the two privileges. The second feature distinguishing these privileges is the fact that the constitutional privilege of speech and debate in the Congress is the primary privilege without which all other privileges would be comparatively meaningless, (Story, Commentaries on the Constitution,

Vol. I, 5th Ed. 1891, p. 630). This aspect of the Speech and Debate clause indicates, as this Court stated in *Tenney and Kilbourn*, that aside from its unqualified directive, that clause must be liberally construed. Third, the constitutional scheme for protecting the integrity of the judiciary—life tenure, no diminution in salary—is necessarily different from that for Congress because of the difference in the nature of the problems. The scheme for protecting Congress is complete freedom of speech and debate and the provision that each House is the judge of the conduct there of its members.

3. In contending that the objective of the privilege would be subverted if the privilege could be used to protect a legislator “in the very act of forsaking that trust in favor of a private allegiance” (Gov’t Brief p. 27), the government claims that the executive power is free to question whether a member of Congress was influenced in making a speech in the Congress by a “private allegiance” which inevitably involves a searching inquiry into his motivations.

“A Senator of the United States is an ambulant converging point for pressures and counter-pressures of high, medium and low purposes.”<sup>56</sup> “Economic pressure, however, is only the beginning for a Senator. In the more intimate sense there is the pressure of constituents, of lobbies, of his own party and of the White House.”<sup>57</sup> Whether a Senator or a member of the House of Representatives was influenced in making a speech by a “private allegiance” would involve a psychological study of his conscious and subconscious mental processes.<sup>58</sup> It would involve not merely an impossible task for a jury but the

<sup>56</sup> Citadel, p. 135.

<sup>57</sup> Citadel, p. 138-9.

<sup>58</sup> See note 54.

annihilation of the Speech and Debate provision of the Constitution and an outrageous invasion of the sanctuary of a member of Congress—his mind.

4. The government fences with windmills when it contends that the Fourth Circuit "may have held" Article 1, Section 5 restricts the power of Congress to provide for judicial punishment of its members (Gov't Brief p. 31). This constitutional provision gives each House authority to punish its members and, with the concurrence of two-thirds, to expel a member. The Fourth Circuit's decision was based on the Speech and Debate Clause of Article 1, Section 6. That Court merely referred to Article 1, Section 5 to indicate that the Senate and House each has the constitutional power to impose sanctions with respect to improper or unethical speech in its chamber.

5. The government contends that a small portion of the testimony "in the government's case in chief" related to Johnson's speech in the House of Representatives and "the government clearly proved its case [under the conspiracy charge] independent of the speech or inferences therefrom" so the Speech and Debate clause did not warrant a reversal. (Gov't Brief pp. 16, 17). When the Court of Appeals found that "one-half of the testimony introduced at the trial related to the speech" (p. 190) the Court was, of course, referring to one-half of the testimony relating to Johnson and accordingly the statement was an accurate one.<sup>50</sup>

<sup>50</sup> A mass of evidence came in with respect to Boykin's land transactions in Southern Maryland and Virginia, the purchase price paid for these tracts of land, their sales by Boykin to land companies formed by the savings and loan associations and the value of the tracts as compared with the purchase price paid for them—all for the purpose of showing (or negating) that Boykin participated in the alleged conspiracy charged in the First Count by having a personal financial interest in the dismissal or postponement of the mail fraud case against Edlin.



The government is mistaken in saying that no testimony "concerned the content or giving of the speech" (Gov't Brief p. 16). Much of it did and Johnson was examined and cross-examined at length on the witness stand with respect to his motivation in giving the speech (Tr. 3191-3204, 3786-3831), the source of material in it, its preparation and drafting (Tr. 3802-03, 3814-3816), and he was even interrogated as to particular statements contained in it (Tr. 3805, 3815).

The District Judge instructed the jury that the jury might find that the government proved "2 separate conspiracies, the first beginning on April 1, 1960 to defraud the United States of its governmental functions largely by the making of the speech by defendant Johnson and distribution of reprints thereof; the second, beginning in 1961 to defraud the United States" by unlawfully seeking the dismissal or postponement of the pending criminal case. (App. 93). Thus the

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All of the extensive testimony relating to events in the year 1960 would seem to bear no relationship to the charges of the substantive counts that Johnson accepted specific checks as compensation for his visits to the Department of Justice after February 1961. This 1960 material included Johnson's speech of June 30, 1960, which was introduced in evidence by the government (App. 258-260) discussions of Heflin, Robinson and Edlin about their hopes that a Congressman might make a speech defending state savings and loan associations, representations made to Johnson as to the unfair treatment being accorded the state savings and loan associations by the federal savings and loan associations, the motivation and content of the speech, the \$500.00 campaign contribution of June 20, 1960, by Robinson to Johnson, the orders for the reprints of the speech and its distribution and the use made of them by the savings and loan associations, etc.

The testimony of the following witnesses related exclusively or almost exclusively to Mr. Johnson's speech of June 30, 1960: Sadie Goldman (App. 160); Martin Heflin (App. 172); Bradford Wyckoff (App. 205); Russell O. Hickman (App. 246); Frances Kiernan (App. 253); Earl Kunkel (App. 255); and Manual Paraque (App. 466, App. Vol. III, p. 36). The testimony of other witnesses, including Johnson and Robinson, related in part to the Johnson speech.

District Judge focused the attention of the jury upon Johnson's speech in the House of Representatives in as definitive a way as was possible. In argument to the jury government counsel placed major emphasis upon Johnson's alleged venal speech. (App. Vol. III 233-249). The notion implied by the government that the evidence with respect to the speech was merely incidental to the all embracing conspiracy charge is without substance.

6. Underlying the narrow construction of the Speech and Debate clause sought by the government is the assumption that the historic reason for it has evaporated. The government's contention presupposes that the executive can now be trusted in the year of our Lord 1965 to act impartially in the public interest in all matters of law enforcement. The Constitution was constructed upon a very different basis, namely, that the exercise of power by men temporarily invested with such power must be carefully circumscribed.

It is significant that the assertion by the executive of the power to make a criminal charge with respect to speech in a legislative chamber, unprecedented since the case of Sir John Eliot in 1629, almost 350 years ago, comes at a time when the overriding critical political problem in our world is the undue development of executive power. In Asia, Africa, Latin America and Eastern Europe there has been a steady deterioration of the vitality of parliamentary power accompanied by an extraordinary enhancement of executive power. "As society becomes more equalitarian it tends increasingly to concentrate absolute power in the hands of one single man." "Caesarism is not dictatorship, not the result of one man's overriding ambition, not a brutal seizure of power through revolution. It is based on a specific doctrine of philosophy. It is essentially pragmatic and untheoretical. It is a slow, often century-old un-

conscious development that ends in a voluntary surrender of a free people escaping from freedom to one autoeratic master.<sup>90</sup>

Thus when the transcendental problem of government almost everywhere is the maintenance of constitutional restraint upon executive power, the executive again in this case challenges legislative liberty.

#### IV

IN ENACTING THE CONSPIRACY STATUTE CONGRESS DID NOT INTEND THAT IT APPLY TO THE MOTIVES OF A MEMBER OF THE HOUSE OF REPRESENTATIVES IN MAKING A SPEECH THERE.

To sustain Count One the Court must find that Congress in enacting the conspiracy statute *intended* that it should apply to a conspiracy relative to a speech in the House of Representatives for the personal profit of a member.

In *Tenney*, members of the Legislature of California were alleged to have violated an 1871 federal civil conspiracy statute which defined the conspiracy with specificity and provided for a civil remedy. This Court held that a basic issue was whether Congress, in enacting the statute, had intended to include within its coverage official acts of a member of a state legislature. The Court determined that Congress did not have such an intention.

The Court said (p. 376):

"Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative

<sup>90</sup> *The Coming Caesars*, de Riencourt (1957). The author detected such a trend in the United States in the growing "father complex" incident to the Presidency with its vast powers.

freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of Sections 1 and 2 of the 1871 statute—now Sections 43 and 47(3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”

Although the statute in that case was designed to provide a civil remedy for a conspiracy to violate civil rights, the Court, as it had done in *Kilbourn*, deemed the Constitutional principle of Article 1, Section 6, which by its terms only related to speech and debate in the Congress, to apply to *all* official acts of legislative members. Although Article 1, Section 6 only related to speech and debate in the *Congress*, the Court deemed its tradition of legislative freedom of such paramount significance that the Court extended it to all official acts of members of a *state* legislature.

The Johnson case does not relate to the acts of members of a state legislature, nor even to official acts of a member of the Congress unrelated to speech and debate; it relates to a speech and its motivation in the House of Representatives, the very heart and core of Article 1, Section 6. As in the case of the 1871 civil conspiracy statute involved in *Tenney*, the limits of the 1867 conspiracy statute involved here “were not spelled out in debate” and there is nothing

in its general language to suggest that Congress could have believed that it was sanctioning a charge of conspiracy to defraud the United States of the faithful services of a member of Congress by making a speech for personal profit on the floor of the House of Representatives. As this Court said in *Tenney* "Did it [the statute] mean to subject legislators to civil [criminal] liability for acts done within the sphere of legislative activity?". The answer the Court gave to the question posed is as plainly applicable to this 1867 criminal conspiracy statute as to the 1871 civil conspiracy statute involved in *Tenney*. Indeed the reasoning of the Court there has a far more solid and logical basis as applied to the situation here than in *Tenney* which involved merely a civil liability since this case involves a penal liability which under established principles must be interpreted strictly for the protection of the rights of an accused.

Is Congress' vital freedom of speech and debate to be at the mercy of a vague, imprecise, all-inclusive charge under a general 1867 conspiracy statute? The federal courts, particularly the district courts, have steadily expanded the meaning of the statute but no Court has ever held before<sup>61</sup> that in enacting the statute Congress could have remotely intended "to overturn the tradition of legislative freedom achieved in England by civil war and carefully preserved in the formation of State and National Governments." Under the teaching of *Tenney* Congress cannot be deemed to have had any such intention.

This conclusion is confirmed by the cardinal principle that, when a statute is reasonably susceptible of 2 interpretations, by one of which it is unconstitutional and by

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<sup>61</sup> Unable to distinguish *Tenney*, in sustaining Count One the District Court ignored it.

the other valid, the Court prefers the meaning that preserves to the meaning that destroys.<sup>62</sup> It is also confirmed by the established principle that, if a statute may be accorded several interpretations, that which involves serious constitutional problems will be avoided.<sup>63</sup> In the case of this penal statute there must be assurance of reasonable certainty in concluding that Congress by necessary implication intended to extend the penalties of the statute to an alleged conspiracy to make a speech for compensation in the Congress. The doubt and ambiguity concerning the scope of the acts forbidden by Sec. 371 beyond those clearly and proximately connected with a conspiracy to defraud the United States of its money or property raise greater doubts that Congress could have meant to encompass within its penal provisions a criminal purpose as to a speech in the House of Representatives.

In *United States v. Gradwell*, 243 U.S. 476 (1917) this Court invalidated an indictment under this same conspiracy statute on the ground that Congress had not intended to include the alleged offenses within the scope of the "defrauding" part of Section 371. There the government charged that the defendants conspired to defraud the United States "in the matter of its governmental rights" by bribing voters in elections of members of Congress. This Court held the defrauding part of the conspiracy statute inapplicable on the ground that it was not the purpose of Congress that it would be so applied and distinguished cases where the conspiracy charged related to the operations of the federal government.

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<sup>62</sup> *Delaware & H Co. v. United States*, 266 U.S. 438, 443 (1925); *Knight Templars' & M. Life Indem. Co. v. Jarman*, 187 U.S. 197, 205 (1902).

<sup>63</sup> *International Assoc. of Machinists v. Street*, 367 U.S. 740, 749 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Although in its general proscription of conspiracy to defraud the United States, Section 371 did not exclude frauds with respect to the election of members of Congress, the Court made the exclusion in interpreting the Section by reason of its limited purposes. As an aid in ascertaining congressional intent the Court focused on the ability of Congress to resort to its jealously guarded power to judge of the elections, returns and qualifications of its members under Article I, Section 5, Clause 1 of the Constitution.

The reasoning of the Court in *Gradwell* is especially pertinent here because Section 6, Clause 1 of Article I prohibits speech or debate in the Congress from being questioned in any other place and each House may punish its members for disorderly behavior and with the concurrence of 2/3rds even expel a member. The Constitution reserved to the Congress the exclusive power to determine the propriety or impropriety of speech; it granted the Congress the non-exclusive power to judge of the elections, returns and qualifications of its own members.

Thus in the case at bar, as in *Gradwell*, there is a constitutional provision conferring paramount authority upon the Congress to deal with the alleged improprieties. The executive has in effect claimed that a portion of the Congressional prerogative has been transferred to it by Section 371 as regards elections (*Gradwell*) and speech in this case. The Congressional prerogative to act as its own disciplinarian is surely a more vital power when a speech by a Congressman is questioned than when interference with a Congressional election is involved. This Court may not hold that Congress intended in enacting Section 371 to surrender a part of its prerogatives with respect to speech in the Congress when the Speech and Debate Clause, unlike the constitutional provision as to



elections, is cast in terms of a prohibition of executive action.

Again in *Hammerschmidt* this Court, in spite of the general language of the conspiracy statute and the Court's expansive *obiter* as to the meaning of its defrauding part, held that it did not reach a conspiracy to defraud the United States by obstructing the functioning of the government by an open defiance of the enforcement of a federal law. There the government claimed that the defendants had published and circulated material designed to elicit disobedience to the provisions of the Selective Service Act. Implicit in the Court's decision must have been a recognition that a contrary interpretation would have involved serious questions under the First Amendment. "The reluctance of the courts to expand the coverage of criminal statutes is particularly important where, as here, the statute results in censorship."<sup>64</sup> The Court held that such an application of the statute was not within the intention of the Congress in enacting Section 371.

In view of the evident doubt as to the reach of Section 371 to encompass very different acts from those which were visualized by the Congress in its enactment, the prior determination by this Court in *Tenney* with respect to a comparable conspiracy statute and in *Gradwell* and *Hammerschmidt* with respect to the very statute in question and the vitality of the great principle of legislative liberty in the Speech and Debate provision of the Constitution, it is submitted that this Court should determine that Congress in enacting the conspiracy statute did not intend that it should apply to a conspiracy relative to speech in the House of Representatives for the alleged personal profit of a member.

<sup>64</sup> *United States v. Alpers*, 338 U.S. 680, 686 (1949); see also *Smith v. California*, 361 U.S. 147 (1959).

## V

THE INDEFINITE NATURE OF THE CONSPIRACY  
CHARGE VIOLATED THE DEFENDANT'S FIFTH  
AND SIXTH AMENDMENT RIGHT THAT THE IN-  
DICTMENT CLEARLY INFORM HIM OF THE OF-  
FENSE CHARGED

## A

The validity of any conspiracy charge must be evaluated and determined by the alleged purpose or objective of the conspiratorial agreement charged. The offense is the conspiracy itself, namely, the unlawful agreement because the offense becomes complete when the agreement is made. The validity or invalidity of the conspiracy charge as well as the scope of the conspiracy depends therefore upon the asserted purpose of the conspiracy.<sup>65</sup> The conspiracy must be sufficiently charged and cannot be aided by allegations of overt acts.<sup>66</sup> When the government alleged, as here, a

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<sup>65</sup> Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L. J. 404, 406 (1959): "The agreement to accomplish the prohibited purpose furnishes, without more, the basis for criminal liability." "The gist of the offense of conspiracy as defined by [Section 371] is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States v. Falcone*, 311 U.S. 205, 210, (1940). See also Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 H.L.R. 276, 278, (1948) and *United States v. Deutsch*, 243 F.2d 435 (3rd 1957).

<sup>66</sup> "The crucial question . . . is the scope of the conspiratorial agreement for it is that which determines . . . whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Grunevald v. United States*, 353 U.S. 391 (1957) "The only effect of the requirement [of Section 371] that an overt act shall be shown is to permit an abandonment of the conspiracy in the meantime and the consequent avoidance of the penalty which the statute imposes." *United States v. Manton*, 107 F.2d 834, 838 (1938). One corollary of this principle is that "a bill of particulars cannot save an invalid indictment." *Russell v. United States*, 369 U.S. 749, 770 (1962).

conspiracy to defraud the United States under Section 371, whether the offense charged is within or without the statute must be determined by the "charging" provision of the indictment which defines the agreement of the parties to the alleged conspiracy as to its objects.

The central charging provision of the indictment here is paragraph (14) (App. 4, 5) which alleges a conspiracy to defraud the United States of its governmental functions and rights "hereinafter described, to wit:." Subparagraphs (a), (b), (c) and (d) then define 4 separate and independent governmental rights. Paragraph (14)(a) concerns the government's right to have its business and affairs and particularly the official business of the Department of Justice conducted honestly and impartially. Paragraph (14)(b) concerns the government's right to have its officers and employees and particularly personnel of the Department of Justice free to transact the official business of the United States unimpaired by the exercise of improper influence. Paragraph (14)(c), almost unintelligible, concerns the government's right to have the functions and duties of Johnson, an official member of the House of Representatives, exercised free from dishonesty resulting from personal and pecuniary interest in the success of Edlin, Robinson, First Colony Savings and Loan Association, First Continental Savings and Loan Association, Charles County Land Company, and Tensaw Land and Timber Company in attempting to get officials of the Department of Justice to postpone the trial of charges contained in an indictment and its eventual dismissal. Paragraph (14)(d) concerns the right of the government not to be deprived of the faithful services of Johnson as a member of the House of Representatives uninfluenced by corruption and uninfluenced by payments of money and other valuable considerations to him by other defendants as compensation for services rendered and to be rendered by Johnson

in behalf of the other defendants in relation to matters pending in the House of Representatives and for services rendered by Johnson before the Department of Justice in relation to proceedings in which the United States was directly interested.

These four stated purposes of the conspiracy are so vague, general and indefinite that under them the Government would be entitled to offer in evidence in support of the charge testimony as to any and all conduct of *any* defendant with respect to *any* matters pending before *any* administrative agency or department of the government or in the House of Representatives. Under the charging part of the First Count, the Government could introduce evidence that any defendant attempted to influence *any* executive officer of the government as to *any* matter or *any* member of Congress with respect to *any* legislation. The purposes of the conspiracy may be deemed limited only by the inchoate expression "to defraud the United States of and concerning its governmental functions" with respect to each of the four general rights specified. The alleged purposes of the conspiracy include *omnia omnibus*.

Paragraphs (15) to (25) inclusive, of the First Count allege definite matters "as a part of said conspiracy" (App. 5, 6) but these paragraphs do not purport to, nor can they, limit or restrict the charges as to the unlimited purposes of the alleged unlawful conspiracy contained in paragraph (14). These later paragraphs do not allege the purposes or objectives of the claimed unlawful agreement but allege "parts" of what the defendants supposedly did under the unlawful agreement defined in paragraph (14).

The Fourth Circuit was in error in holding that paragraphs (15) to (25) rather than paragraph 14 stated the objects and purposes of the conspiracy. 337 F.2d, p. 185.

This strained interpretation of the conspiracy count is not only repudiated by the language used but it was emphatically rejected by the government in the course of a pre-trial hearing. There the United States Attorney made clear that it was the position of the government that paragraph (14) did define the purposes of the conspiracy. He stated to the Court:

If "there is another major area which we feel falls within the pattern of (14)(d)" it can be proven. (Tr. 29).<sup>67</sup> To an inquiry by the Court as to what he meant by "major area" the United States Attorney said "let us suppose that Congressmen Boykin and Johnson unbeknownst to us hire a Senator and they all went to the Vice President to try and have a speech made on the floor of the House about savings and loan associations or something" [sic] (Tr. 29). The Court later said "You were not limiting yourself to those because you are saying that in addition to those you claim the right to prove anything provable under 14". United States Attorney: "That's correct." The Court; "According to Mr. Doub you said that." United States Attorney: "Yes." The Court: "And you certainly have not disclaimed it. Now I think Mr. Doub is right that if you are not limited in any way that you could prove under 14 almost anything, under (14) (a), (b), (c) and (d)." United States Attorney: "Anything your Honor pertaining to a conspiracy among Johnson, Edlin, Boykin and Robinson, First Colony Savings and Loan, First Continental, Charles County and Leisure City and so on." The Court: "But all of them do not have to be in it. It is broad enough to cover any conspiracy between Johnson and Boykin for any money paid to either one of them to influence the vote of himself and the other on any subject that comes before the House of Representatives..." (Tr. 33) The Court: "There might be an appropriation bill that would bene-

<sup>67</sup> References here are to transcript of pre-trial hearing on December 7, 1962.

fit one of the properties owned by one of these corporations . . ." (Tr. 33)

Thus government counsel, who prepared this indictment and knew best its intended scope, interpreted paragraph (14) as defining the purposes of the conspiracy and he was insistent that the government was at liberty in developing its proof at trial to establish any matters within the indefinite scope of paragraph (14).

Even if paragraphs (15) to (25) with their allegations as to more definite matters "as a part of said conspiracy" could be considered to be included in the charging provisions as to the unlawful objects of the conspiracy, these stated *parts* of the conspiracy cannot be deemed to add up to the *whole* because the government was free under paragraphs (14) to offer in evidence as *other* "parts of the conspiracy" any relationship of any of the defendants to *any* of the officers or employees of *any* agency of the government.

Even if the government was mistaken in its pre-trial position and the District Court and the Fourth Circuit were technically correct in concluding that paragraphs (15) to (25) stated the objects of the conspiracy, a criminal charge of a felony may not be open to such differences of opinion. If reasonable men may differ as to the interpretation of a criminal charge, if the government may interpret that charge one way before trial and a contradictory way after trial on appeal, the charge is too vague and ambiguous to meet the tests of the Fifth and Sixth Amendments. The construction of an indictment may not be treated as though it is a will or corporate trust indenture.

Since the government was not required to allege more than one overt act and such acts cannot aid the validity of a conspiracy charge, can it be said that this charge of

conspiracy with its multiple, inchoate, indefinite objectives informed Johnson of the nature of the accusation in conformity with the Fifth and Sixth Amendments? As the Ninth Circuit said in *Terry v. United States*, 7 F.2d 28, 30 (9th 1925). "Conspiracy is not an omnibus charge under which you can prove anything and everything and convict for the sins of a lifetime."

The charge as to the unlawful objects of the conspiracy was divorced from reality. The First Count of the indictment said in essence that the defendants unlawfully agreed (1) to defraud the United States and its officials of its governmental functions including the faithful services of Johnson and Boykin and (2) to defraud the United States of faithful services of the executive officers of the United States including those of the Department of Justice. It would be difficult to believe that anyone anywhere would in actuality enter into such an artificial, scholastic and metaphysical agreement. No government should be permitted under the Fifth and Sixth Amendments to declare the objects of a "conspiracy" to defraud under Section 371 in such unlimited, uninformative, slippery terms.

As a consequence of the protean character of the alleged conspiracy, at the trial there were no conceivable standards for the admission of evidence under the conspiracy charge. Nor was there any knowable standard for the determination by the District Court of the sufficiency of the evidence under the First Count. If the government had offered evidence that in June, 1960, Johnson agreed to make a speech for compensation, would it be necessary for the government to submit under the First Count *any* evidence that in 1961 he made visits to Justice for compensation? Would it be sufficient for the government to offer evidence that Johnson made visits to the Department of Justice with respect to the



pending criminal case for compensation and submit no evidence as to the speech? In this event the conspiracy to defraud charge would have to be deemed nothing more than a conspiracy to violate Section 281, the conflict of interest statute involved in the substantive counts of the indictment. Was it necessary for the government to prove knowing false representations to an official of the Department of Justice when at common law the crime of deceit and fraud has universally required such a representation?

Would it be sufficient for the government to offer evidence that Johnson was, or might have been, influenced by the \$500.00 political campaign contribution made 10 days before his speech defending Maryland state savings and loan associations? The government correctly asserted in the Fourth Circuit that under the conspiracy charge "*the government certainly did not have to prove that the Congressman's sole motive in giving the speech was to receive compensation or to aid Edlin or Robinson . . .*" (Gov't Brief in the Fourth Circuit p. 42). Thus it was not necessary for the government to establish that Congressman Johnson was employed, or even consciously agreed, to make a speech in consideration of the campaign contribution made June 20, 1960, 10 days before his speech. It was enough for the jury to find that the campaign gift was an influencing factor. This position of the government, with which we agree, also made clear that the government did not even have to prove that an "antecedent agreement" was made or that Johnson was even motivated in part by the campaign contribution; it was sufficient for the jury to find that he wished to aid Edlin or Robinson. A scintilla, a peppercorn, of evidence was sufficient under Count One.

Mr. Justice Jackson said in *Krulewitch v. United States* 336 U.S. 440, 453, "A conspiracy often is proved by evidence that is admissible only upon assumption that con-

spiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . .” Here a conspiracy was proved largely by hearsay evidence that was not even admitted against Johnson (page 10 herein). Yet counsel for the government hammered these statements, which Johnson was helpless to rebut, down the throat of the jury as the most convincing evidence of a conspiracy to make a speech for compensation in disregard of the ruling of the District Judge (Tr. 421-423) and on appeal the Fourth Circuit and the government blithely treat these hearsay statements as evidence of the conspiracy (Gov’t Brief, 5, 6). So we have in this case the most conspicuous confirmation of the dangers of conspiracy procedure described by this Court in *Grunewald, Krulewitch and Kotteakos v. United States*, 328 U.S. 750 (1946).

The issue under the First Count of the indictment charging conspiracy to defraud the United States of its governmental rights was never clearly defined. Unable to formulate for the jury a meaningful purpose of the alleged conspiracy, the District Judge was compelled to refer to its objects “as alleged in the indictment.” (App. 88). The District Judge then paraphrased for the jury paragraphs 14, 15, and 16 of the conspiracy count. (App. 90-93).

Under the formless conspiracy charge, Government counsel in argument to the jury also had no standards to apply to the evidence. In final summation to the jury, the United States Attorney argued repeatedly that Johnson had a “personal interest” in his visits to Justice and therefore the jury should convict under the conspiracy count (Tr. 6192, 6196, 6197, 6225, 6230) although Congress had not made it a federal offense for a member of Congress to communicate with an executive agency with respect to a pending matter when the member had a personal interest

in it.<sup>68</sup> Yet Count One was sufficiently all-inclusive to permit the United States Attorney to make this argument and for the jury to create an offense which Congress had not established.

To permit an open ended indictment as was presented in the case at bar to stand would be to "... allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment [and] would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of fact not found by and perhaps not even presented to the grand jury." *Russell v. United States*, 369 U.S. 749, 770 (1962). See also *Smith v. United States*, 360 U.S. 1 (1959). For this reason, the Fifth Amendment has been held to mean that an indictment to be valid must leave little open to the prosecutor or court in the construction of an indictment. If the offense is not plainly charged, it becomes charged only by a process of interpretation. When this is the case, there is no assurance that the grand jury would have charged the offense which the judge or prosecutor has found lurking in a dark corner of the indictment. "If the choice of one or more out of many unidentified crimes may be made by the prosecutor, then presentment by a grand jury will have become a useless historic ritual." *Van Liew v. United States*, 321 F.2d 664, 669, 672 (5th Cir. 1963).

The guaranty of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusa-

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<sup>68</sup> The conflict of interest statute, 18 U.S.C. 281, made it an offense for a member of Congress to receive or agree to receive compensation for services rendered in relation to a proceeding before an administrative department.

tion; . . ." was likewise violated by Count One. "The vice of [this indictment] is that [it] failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, i.e., that [it] failed to sufficiently apprise the defendant of what he must be prepared to meet." *Russell v. United States*, 369 U.S. 749, 764 (1962); *United States v. DeBrow*, 346 U.S. 374, 377, 378 (1953); *Cole v. Arkansas*, 333 U.S. 196, 201, 202 (1948); *Berger v. United States*, 295 U.S. 78, 82 (1935); *Hagner v. United States*, 285 U.S. 427, 431 (1932); *Rosen v. United States*, 161 U.S. 29, 34 (1896); *Cochran and Sayre v. United States*, 157 U.S. 286, 290 (1895); *Potter v. United States*, 155 U.S. 438, 445 (1894); *United States v. Simmons*, 96 U.S. 360, 362 (1878); *United States v. Cruikshank*, 92 U.S. 542, 558 (1876).

In sustaining this count, the District Judge relied upon *Manton v. United States*, 107 F.2d 834 (2nd Cir. 1938) and *May v. United States*, 175 F.2d 994 (D.C. Cir. 1949) but it will be found that, although the conspiracy charge in each of these cases was broad, it was not comparable to that here. Count One of this indictment is without precedent.

The omnivorous allegations of paragraph (14) with respect to agreed efforts to obstruct governmental functions would permit the government's case to run the gamut from proof of a pact between Johnson and another party named in the indictment that Johnson would spit on a District of Columbia sidewalk to proof of a pact that Johnson would attempt the violent overthrow of the government of the United States. When an indictment is so open ended, the strictures of the Fifth and Sixth Amendments are violated.

## VI

THIS COURT SHOULD REPUDIATE THE ALL EM-  
BRACING CONCEPT OF SECTION 371 SOUGHT BY  
THE GOVERNMENT

## A

The government did not elect to charge Johnson in the indictment with conspiring to commit an offense against the United States as authorized by Section 371. The indictment did not charge him with conspiring to commit any substantive offense established by the Congress, including Section 281, the conflict of interest statute involved in the substantive counts of the indictment or Section 205, the bribery statute. Instead the government elected to charge Johnson with conspiracy to defraud the United States of its governmental functions and of his faithful services under Section 371 as interpreted in *Haas v. Henkel*, 216 U.S. 462 (1910) and *Hammerschmidt v. United States*, 265 US 182 (1924).<sup>68a</sup>

Both the District Court and the Fourth Circuit relied on *Haas* and *Hammerschmidt* in sustaining the validity of the conspiracy charge. The District Judge's instructions to the jury paraphrased the *Hammerschmidt* dictum (265 U.S. at 188) as to the meaning to be accorded "defraud the United States".<sup>69</sup>

<sup>68a</sup> In *Glasser v. United States*, 315 U.S. 60 (1942) the *Haas* and *Hammerschmidt* interpretation was not challenged.

<sup>69</sup> "The language of this statute forbids an illegal agreement to defraud the United States in any manner or for any purpose. It has been legally decided by the courts, and I so instruct you, that the phrase 'defraud the United States in any manner or for any purpose' is not limited merely to conspiracies to deprive the United States of money or property or other things of pecuniary value. It also comprehends the right of the government not to be defrauded of the unbiased, independent, faithful, loyal services of its employees, including Congressmen, and that its legitimate official action shall not be defeated by misrepresentation, chicanery, overreaching trickery, or by means that are dishonest." (App. 89, see also 92).

Johnson earnestly requests this Court to reconsider the expansive interpretation accorded the "defrauding" provision of the conspiracy statute (18 U.S.C. Sec. 371) in *Haas* and in the dictum in the opinion of Chief Justice Taft for the Court in *Hammerschmidt*.

Sec. 371 made it an offense for two or more persons to conspire to commit an offense against the United States or to defraud the United States in any manner or for any purpose. This Section was adopted in 1867, as a result of clamor for the repression of tax violators and it was included in a 34-section statute designed to plug loopholes in the tax laws.<sup>70</sup> The conspiracy provision, then Section 30, was added to the House Bill by the Senate without any explanatory reference appearing in the hearings and reports. Section 30 was enacted at a time and in a setting strongly suggesting that it was primarily aimed at conspiracy to commit offenses against the revenue and to defraud the United States of its revenue.<sup>71</sup> In view of the general language of the defrauding provision, the Supreme Court in *United States v. Hirsch*, 100 US 33 (1879) expanded the meaning of the word "defraud" to include fraud "against the coin" or "cheating the government of its land or other property."

In *Hammerschmidt* the Court defined the prohibited object of a conspiracy as cheating the government out of property or money and secondarily as obstructing lawful governmental functions by deceit, craft, trickery, "dishonest means" or "overreaching."<sup>72</sup>

<sup>70</sup> The history of the provision is traced in Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, (1959); see also *United States v. Gradwell*, 243 U.S. 476, 481 (1917).

<sup>71</sup> *United States v. Allen*, 24 Fed. Cas. 772 (C.C.E.D.N.Y. 1868); *United States v. Thompson*, 29 Fed. 86, 87 (C.C. Ore. 1886).

<sup>72</sup> The language used in the earlier *Haas* case, 216 U.S. 479-80 is also incredible in its expansive reading of the statute: "... The statute

A statute which in general terms creates a criminal offense should be interpreted in accordance with the usual and ordinary meaning of the words used. "Fraud" and "defraud" have traditionally and universally involved the cheating of another out of his money or property by misrepresentation, deception, deceit or trickery. When this Court indicated in *Hammerschmidt* that "conspiracy to defraud" also meant conspiracy to obstruct governmental functions by deceit, "dishonest means", "overreaching", the Court made a drastic departure from the customary meaning of the words used by the Congress and thus expanded this penal conspiracy statute far beyond its plain meaning. Indeed the Court's effort to expand the statute to the obstruction of governmental functions is unparalleled distortion of language.

"The obstruction of lawful, governmental functions" has no definable meaning. It affords no standard for the application of the command of the statute. The legislative command of a penal statute must be understandable by those to whom it is addressed,<sup>73</sup> but the language of the command, as in-

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is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government. . . . [I]t must follow that any conspiracy which is *calculated to obstruct or impair its efficiency* and destroy the value of its operations and reports as fair, impartial, and reasonably accurate, would be to defraud the United States. . . ." (Emphasis supplied).

<sup>73</sup> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). See also *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). *United States v. Spector*, 341 U.S. 169, 171 (1952) ". . . [A] statute, plain and unambiguous on its face, may be given an application that violates due process of law. . . ."



terpreted by Chief Justice Taft, is not definite enough to be intelligible. "Dishonest means" and "overreaching" have no more meaning in law than "sinful", "wicked", or "unethical." Such indefinite words are inherently subjective and merely express whatever happen to be current notions of unethical or "bad" conduct. Such vagaries and indefiniteness—not in the penal statute but in the gloss put upon the statute by the judiciary—does not meet contemporary Sixth Amendment standards that an accused be informed of the nature of the accusation against him. If Congress had embodied in the statute the vague expansive definition of conspiracy to defraud the United States contained in *Hammerschmidt*, its unconstitutionality as a violation of the Sixth Amendment and due process would seem apparent.

The *Hammerschmidt* broadside dictum not only expands Section 371 beyond sensible limits but it casts the judiciary in the impossible position of attempting to develop upon a case by case basis an unpublished penal code of ethics by judicial fiat without according any recognition to the legislative responsibility of the Congress. This is a task outside the bounds of judicial interpretation for it is better for the Congress, and in accord with its functions, to revise the statute than for the Court to guess at the revisions it would make. That task Congress can do with precision; the Court can do no more than make speculative law.<sup>74</sup>

It is for the legislative branch to say what acts are to be treated as criminal and the courts have no roving commission to declare agreements criminal or against public policy according to their subjective moral concepts of what is expedient for the welfare of the State. Lord Halsbury in *Janson v. Driefontein Consol. Mines, Ltd.* (1902) A.C.

<sup>74</sup> *United States v. Evans*, 333 U.S. 483, 495 (1948).

484, 490. Yet that is precisely the interpretation which the Government seeks this Court to accord the conspiracy statute.

The unfortunate *dictum* of *Hammerschmidt* violated several of the Supreme Court's most often repeated canons of statutory construction. A criminal statute must be interpreted strictly and any doubt resolved in favor of the accused.<sup>75</sup> Before one can be punished under the federal law, his case must be "plainly and unmistakably" within the provisions of a statute.<sup>76</sup> The approach of the government seeking a shadow-land area as a trap for the unwary is "... the very negation of a fundamental tenet of criminal law in the western world: that no one can be punished for conduct which had not been legislatively defined and classed as a crime in advance of its commission."<sup>77</sup>

"A criminal statute is to be construed strictly, not loosely. Such are the teachings of our cases from

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<sup>75</sup> The principle has been expressed in numerous decisions of this Court. *United States v. Boston & M. R.R.*, 85 S. Ct. 868 (1965); *Yates v. United States*, 354 U.S. 298 (1957); *Smith v. United States*, 360 U.S. 1, 9 (1959); *Williams v. United States*, 341 U.S. 97, 101 (1951); *United States v. Alpers*, 338 U.S. 680, 681 (1950).

<sup>76</sup> *United States v. Gradwell*, 243 U. S. 476, 485 (1917); quoting *United States v. Lacher*, 134 U.S. 624, 628 (1890).

<sup>77</sup> Goldstein, p. 444. The Conclusions of the International Commission of Jurists on the Rule of Law In A Free Society, New Delhi, India, January 5-10, 1959, included "the definition and interpretation of the law should be as certain as possible, and this is of particular importance in the case of the criminal law, where the citizen's life or liberty may be at stake." "The Rule of Law requires . . . that he [an accused person] should be given notice of the charge with sufficient particularity." "No person of sound mind shall be deprived of his liberty except upon a charge of a specific criminal offense." International Commission of Jurists, *Executive Action and the Rule of Law*. pp. 9, 11, 19. (Geneva). See also pp. 62, 64, 67, 68, 73, 108, 109-111, 114-117.

*United States v. Wiltberger*, 5 Wheat 76, down to this day. Chief Justice Marshall said in that case: 'The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.' *Id.*, 95.

The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition. *United States v. Weitzel*, 246 U.S. 533."

Under Section 371 a conspiracy to do a lawful act is not illegal. A conspiracy to commit an act reprehensible in the forum of good morals is not an indictable conspiracy. The incredible expansion of the conspiracy to defraud part of Section 371 beyond conspiracy to defraud the government of its property and coin to conspiracy to defraud the government by obstructing governmental functions has made the unlawfulness of conduct depend upon *post hoc* subjective judgments by the judiciary and the triers of fact. Under the guise of enforcing this statute the courts are in reality creating federal offenses which have not been established by Congress.

If the government had charged a conspiracy to violate a statute creating a substantive offense such as Section 281, the conflict of interest statute, or Section 205, the bribery statute, the charge would not only have been clearly authorized by the Congress but would have been intelligible and knowable and the trial would have proceeded subject to recognizable legal principles.

If Johnson had been charged with conspiring to commit the substantive offense of Section 205 he would have been entitled to contend that there was no evidence that he con-

spired to accept a bribe to influence "his vote, act or decision in any question, matter, cause or proceeding which may at any time be pending in either House." (18 U.S.C. 205). If he had been charged with conspiring to violate Section 281, government counsel could not have argued to the jury that he had a "personal interest" in his visits to Justice. (see page 83 herein). Thus the government used the conspiracy to defraud provision of Section 371 to circumvent the limitations of Sections 205 and 281.

The development of conflict of interest penal statutes with respect to the executive officers of the government has been one of the most difficult and perplexing tasks of federal and state legislators.<sup>78</sup> That task as applied to members of the Congress and state legislators, elected representatives of the people, has been even more difficult and perplexing because additional problems are involved which are not incident to conflict of interest as applied to administrative officers and employees.<sup>79</sup> To allow the executive and judiciary free license to resolve this dilemma on an *ad hoc* basis as has been attempted in the case at bar by ignoring in the conspiracy count section 281, the sole legislative pronouncement in the area, is contrary to every known tenet of fairness in criminal law. What could be a sharply focused charge in the best tradition of criminal law, becomes a vague, amorphous accusation, its boundaries unknown and unknowable.

It is beyond belief that in enacting the conspiracy statute in 1867 as a part of a revenue measure Congress could have intended to permit the executive power, abetted by the judiciary, to roam at large in the area of ethics, conflicts of

<sup>78</sup> See generally, Conflict of Interest and the Federal Service, Chapter III.

<sup>79</sup> *International Assoc. of Machinists v. Street*, 367 U.S. 740 (1961).

interest and loyalty. To permit such meandering is to allow a substitution of judicial for congressional judgments as to these sensitive and delicate areas. To allow a jury to infer a criminal "conspiracy" to defraud the United States by obstructing governmental functions means that a jury must determine far more than that there was a conspiratorial agreement within established legal principles. The jury must decide that the objective of the agreement was to defraud the United States by obstructing governmental functions or their efficiency (*Haas*) or by depriving the government of the faithful services of its officials by dishonest means. (*Hammerschmidt*) This elegant language means that a judge or jury may apply their own notions of ethics, propriety and loyalty in determining a defendant's guilt.

In recent years the Supreme Court has taken cognizance of the menace to individual liberty incident to indictments for conspiracy and has expressed in the most emphatic way its concern as to basic constitutional values threatened by this "darling" of the prosecution. The Court's criticism has been particularly intense with respect to conspiracy charges where prosecution for the substantive offense is possible but the government has included a conspiracy charge to afford it major tactical advantages. *Kotteakos* reversing a conspiracy conviction. In *Krulewitch* (p. 446) reversing a conspiracy conviction, Mr. Justice Jackson said, "The modern crime of conspiracy is so vague that it almost defies definition." "The modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the Court of the Star Chamber" (p. 450). "Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice." In *Grune-wald v. United States*, 353 U.S. 391, where a conspiracy con-

viction was reversed, the Supreme Court cited Justice Jackson's opinion in *Krulewitch* with approval. See also: *Paoli v. United States*, 352 U.S. 232 (1957) (dissenting opinion of Justices Frankfurter, Black, Brennan and Douglas); *United States v. Falcone*, 109 F.2d 579, 581 (1940) 2d Cir. Judge Learned Hand).<sup>80</sup>

This Court's ill-considered expansion of the conspiracy statute far beyond the limits of logic, reason and its own principles is at war with the contemporary recognition by the Court of the dangers inherent in a conspiracy charge. Criticism by legal scholars of the judiciary's expansion of the defrauding portion of the conspiracy statute has been justifiably virulent.<sup>81</sup> In its anxiety to reach any kind of "unethical" conduct involving officers and employees of the government, this Court in *Haas* and *Hammerschmidt* deprived the defrauding part of Section 371 of any ascertainable meaning. The command of the penal statute became an open ended, floating, indefinable protean prohibition of conduct which might in the future, by the current

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<sup>80</sup> For other criticisms of the law of conspiracy see O'Dougherty, *Prosecution and Defense Under Conspiracy Indictments*, 9 Brooklyn Law Rev. 263 (1940); Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 425 (1922); Goldstein, *Conspiracy to Defraud the United States*, 68 Yale Law Journal, 404 (January 1959); *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 Harv. L. Rev. 276, 283-84 (1948); Note, *Criminal Conspiracy: Bearing of Overt Acts upon the Nature of the Crime*, 37 Harv. L. Rev. 1121, 1123 (1924); Klein, *Conspiracy—The Prosecutor's Darling*, 24 Brooklyn L. Rev. 1, 405 (1957); Note, *The Conspiracy Dilemma*, 62 Harv. L. Rev. 276, 278-79 (1948); Note, *Guilt by Association*, 17 U. Chi. L. Rev. 148, 153 (1949); Report of the Conference of Senior Circuit Judges in 1925, Chief Justice Taft presiding; Darrow, *The Story of My Life*, 64, 144-145; Kenny, *Outlines of Criminal Law*, Sec. 454; O'Brien, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592, 599-600 (1948).

<sup>81</sup> See note 80.

standard of ethics or loyalty, be deemed undesirable. Such a concept of crime is not only at variance with basic principles of ordered liberty but is an uncomplimentary reflection upon the competence of the Congress to declare and define by legislative act what is a criminal offense.

The sensible limitation of the "defrauding" provision of Sec. 371 sought by Johnson, would not hamper the prosecutor's law enforcement activities. Analysis of the cases applying the *Haas* and *Hammerschmidt* rationale indicates that virtually all of them involved acts punishable as an "offense" against the United States.<sup>82</sup> Almost all were subject to prosecution under the part of the statute which proscribes conspiracy to commit "any offense against the United States."

Under the interpretation of Section 371 in *Haas* and *Hammerschmidt* the federal police have been vested with license to interfere with the freedom of action of practically every individual.

"[T]his is no longer a time when anti-social conduct so outstrips the available crimes that a catch-all crime is essential in order to deter persons particularly at the federal level from approaching the outer limits of criminality. Indeed today's detailed federal criminal code reaches so broad a range of anti-social conduct, and in such overlapping fashion that multiplicity of categories, not sparseness of categories, is the essential problem. Further Congress sits in almost continuous session ready to act on recommendations for criminal legislation from the multitude of federal agencies dealing with all approaches of our national life. The rapidity with which curative legislation can be enacted makes it unlikely that many persons will long escape

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<sup>82</sup> Goldstein, *Conspiracy*, p. 436-411.



prosecution for conduct deemed objective to societal norms".<sup>83</sup>

Thus it would seem that continued reliance on *Hammer-schmidt* is a prosecutor's apron string which can be painlessly severed. It should be put to rest with dispatch.

## B

If this Court concludes that it is constrained to follow *Hammerschmidt* and *Haas*, it is submitted that the accusations as to the speech made in the pending case are not within their scope. The essential components of even the subsidiary meaning of conspiracy to *defraud* under those cases are (1) obstruction or interference with a lawful governmental function and (2) fraud, deceit, craft, etc. Mr. Johnson's alleged collaboration with others in the preparation of his speech, his delivery of the speech for an alleged gift and his ordering of copies from the Government printing office for publication cannot be deemed an obstruction or interference with any lawful governmental function. It is apparent that this Court in *Haas* and *Hammerschmidt* had in mind obstructions, or interference, with the conduct of the executive or judicial departments of the government, but, if the *dictum* were expanded to encompass obstructions of the conduct of the legislative branch, by no process of reasoning may the accusations as to the Johnson speech be deemed an obstruction, or interference with, the functions of the House of Representatives or any business of the House. This speech, unrelated to pending legislation, did not even remotely affect the functioning of the House. Fraud, deceit,

<sup>83</sup> Goldstein, *Conspiracy*, p. 462. Virtually all of the major regulatory statutes contain at least one provision making it a crime to violate other provisions of the statute.

and craft involve false statements or misrepresentation and no false statement or misrepresentation was alleged or proven.

As to the claim of the Government at the trial that the acceptance of a political campaign gift in connection with a speech is "dishonest" and so within *Hammerschmidt*, we wish to point out that another part of that opinion disclaims that all dishonest acts are includable in the statute (p. 188). The opinion does suggest that bribery of an "official" is within the statute but an elected member of Congress cannot be deemed to be a government official because the relationship of the government to a legislator is not that of employer and employee.<sup>84</sup> A member of Congress has no duties outside of Congress and he has no duties within his chamber except those which arise out of his right to vote and to speak. *Montefiore v. Menden Motor Components Co.* (1918) 2 K.B. 241.

We submit that, under the most liberal interpretation of the *Hammerschmidt* *Obiter*, alleged "unethical" or "dishonest" or "overreaching" speech in the Congress is not within its ambit and for this Court to hold that the accusations by the Government with respect to Mr. Johnson's speech in the House contained in Count One of the indictment, and the evidence under Count One, are within the scope of the conspiracy statute, it must further expand the criticized and ill-conceived words of *Hammerschmidt* beyond rational limits.

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<sup>84</sup> Manning, *Federal Conflict of Interest Law*, 78-79 (Harvard, 1964) and Yankwich, *The Immunity of Congressional Speech*, 99 U. of Pa. Rev. 960, 975.

## VII

**THE FOURTH CIRCUIT CORRECTLY HELD THAT  
THE EFFECT OF THE UNLAWFUL CONSPIRACY  
CHARGE WAS SO PREJUDICIAL AS TO REQUIRE  
REVERSAL UNDER THE SUBSTANTIVE COUNTS.**

The Fourth Circuit concluded:

“... the invalidity of count one as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts. Many of the events testified to at the trial related only to the speech. It was introduced into evidence and its authorship, contents, motivations and accuracy made the subject of extensive inquiry. The conclusion is unavoidable that this mass of evidence and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflicts of interest counts. The judgment against Johnson is therefore vacated and the case remanded for a new trial on the counts charging violations of 18 U.S.C.A., Sec. 281. . . .” (337 F.2d at 204)

Although the government reserved this question in its Petition for Certiorari (Pet. p. 11), the government has not questioned in its Brief in this Court the correctness of this conclusion of the Fourth Circuit.<sup>85</sup> Nor did the government contest our position as to this in its brief in the Fourth Circuit.

The trial of this case involved in large part the accusations contained in the conspiracy charge and we estimate that not less than 70% of the testimony related to its charges. Its broad scope enabled the government to put in evidence a vast amount of testimony which would not

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<sup>85</sup> The Government has only argued that the evidence under the conspiracy charge as to the speech did not violate the Speech and Debate clause. (Gov't Brief pp. 16, 17).

have been admissible under the substantive counts. The extensive testimony relating to events in the year 1960 would seem to bear no relationship to the charges of the substantive counts that Johnson accepted specific checks as compensation for his visits to the Department of Justice after February 1961. This 1960 material included Johnson's speech of June 30, 1960, discussions about the speech, its preparation, motivation and content, the \$500.00 campaign contribution of June 20, 1960, the orders for the reprints of the Speech, its distribution, a retainer of \$1,000.00 paid Johnson by Robinson on August 30, 1960, for future legal services for the savings and loan associations, a political campaign contribution of \$300.00 on 1960, and Johnson's legal services for the savings and loan associations in the fall of 1960 and the winter of 1960-61.

The testimony of numerous witnesses related to Johnson's speech of June 30, 1960, and a mass of evidence came in under the conspiracy charge with respect to Boykin's substantial land transactions in southern Maryland and Virginia. See note 59 page 67 herein. The extensive jury arguments of government counsel related principally to the evidence which they claimed supported conviction under the conspiracy charge (Tr. 6218-6221, 6225-6228).

As the Court of Appeals held, the substantive counts cannot be divorced from the all-persuasive conspiracy charge and the evidence submitted under it. That unlawful charge was so prejudicial and deadly that this Court may not conclude that it did not influence the jury as to the substantive counts. *Kotteakos v. United States*, 328 U.S. 750, 764, 765. "Proof that the Plaintiff in error was guilty of another crime was in itself prejudicial." *Terry v. United States*, 7 F.2d 28 (9th Cir. 1925); *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963); *Hawkins v. United States*, 358 U.S. 74, 79 (1958).

The standard in *Kotteakos* (page 765) to be applied in deciding whether substantial error requires reversal is that "... if one cannot say, *with fair assurance*, after pondering all that happened without stripping the erroneous action from the whole that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."<sup>85a</sup>

The Fourth Circuit has unanimously held that the invalid conspiracy charge and the evidence submitted under it "was obviously prejudicial to his [Johnson's] right to the unbiased consideration of the jury on the remaining counts." The government did not claim otherwise in the Fourth Circuit and has not done so here. No one could say with "fair assurance" that the judgment under the substantive counts was *not* infected by the unlawful conspiracy charge and the evidence submitted under it.

## PART TWO

### IMPORTANT ISSUES ERRONEOUSLY RESOLVED BY THE FOURTH CIRCUIT IN FAVOR OF THE GOVERNMENT

Affirmance by this Court of the decision of the Court of Appeals as to the invalidity of the conspiracy charge will mean that Johnson may be retried by the Government under the substantive counts. It would seem imperative therefore for this Court to consider and review certain adverse and erroneous decisions by the Court of Appeals

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<sup>85a</sup> The Court in *Kotteakos* pointed out that the standard to be applied when a constitutional right has been denied might be even more liberal: "If, when all is said and done, the conviction is *sure* that the error did *not* influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." at page 764-65, citing *Bruno v. United States*, 308 U.S. 287 (1939), and *Ballard v. United States*, 329 U.S. 187, 195 (1946).

for the guidance of the District Court.<sup>86</sup> Otherwise upon a new trial they will be binding upon the District Court. Accordingly counsel for Johnson deem it necessary to submit these issues here in order that upon a retrial Johnson may be accorded the rudiments of a fair trial.

# I

THE DISTRICT COURT WAS IN ERROR IN REFUSING JOHNSON ACCESS TO THE TRANSCRIPT OF ALL TESTIMONY BEFORE THE GRAND JURY WHICH INDICTED HIM WHEN THE GOVERNMENT HAD BREACHED THE "SEAL OF SECRECY" IN VIOLATION OF CRIMINAL RULE 6(e).

At the opening of Court on the first day of trial, counsel for a co-defendant advised the Court that an entire volume of grand jury testimony containing the testimony of various witnesses had been made available to a prospective witness and his attorney by the United States Attorney in violation of Rule 6(e) of the Federal Rules of Criminal Procedure<sup>87</sup> which requires court action for

<sup>86</sup> If this Court sustains the conspiracy charge, Johnson would also seem to be entitled to have this Court review these questions.

<sup>87</sup> Rule 6(e): Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

such a breach of the secrecy of grand jury proceedings (Tr. 4, 6). Counsel for the co-defendant moved that the Court release all grand jury testimony to the defendants and allow reasonable time for defense counsel to study the grand jury testimony prior to the beginning of the trial (Tr. 6). This motion was adopted on behalf of Johnson (Tr. 17).

The United States Attorney admitted of record to the Court that the volume of grand jury testimony containing the testimony of Mr. Finneran, Mr. Shoultise and others had been given to Mr. Finneran and his attorney (Tr. 8-10). At the very least permission was granted to examine the testimony of Mr. Finneran and Mr. Shoultise. Had permission to examine the other testimony in the volume been requested, such permission would have been granted (Tr. 10). The Government did not challenge the representation to the Court by counsel for Johnson's co-defendant that Mr. Finneran and his counsel had read the testimony of Mr. Dixon, Mr. Shoultise, Mr. Wechsler and Mr. Finneran (Tr. 4-5). They had the opportunity to do so because they had been left alone in a room with the volume of the grand jury transcript (Tr. 21).

The defendants' motion was denied. On the "tit for tat" theory the District Court merely made available to defense counsel the one volume of grand jury testimony, the secrecy of which was breached by the government (Tr. 61-66). The Fourth Circuit found no error in this ruling (337 F.2d 196-98).

## A

### THE GRAND JURY TRANSCRIPT SHOULD BE AVAILABLE TO THE ACCUSED AFTER HIS INDICTMENT

The "seal of secrecy" of Grand Jury proceedings in the United States is an anomaly in the administration



of criminal justice in western civilization. Under the civil law of Western Europe and Latin America, the function of a Grand Jury is performed by a *Judge d'instruction* and, if this investigating judge finds probable cause and authorizes a criminal prosecution, defense counsel are entitled to access to his entire file including all statements of witnesses. In England where the Grand Jury has been abolished, its function is performed by a judge at a preliminary hearing and the accused has full access to all testimony adduced at that hearing.

This Court's refusal in *Pittsburgh Plate Glass v. United States*, 360 U.S. 395 (1959), a 5-4 decision, to give Section 6(e) sufficient scope to be of real value in discovery has been widely condemned for its uncritical exaltation of secrecy for secrecy's sake.<sup>88</sup> The fact that the expressed classic values of grand jury secrecy do not withstand analysis when applied after indictment is especially disturbing when it is recalled that lack of opportunity to adequately prepare a defense may result in a conviction in a case, where, had all of the facts been known to the defendant, the conviction would not have been obtained. With commendable candor,

<sup>88</sup> Mr. Justice Brennan, said for himself, the Chief Justice, Mr. Justice Black and Mr. Justice Douglas, "The court's insistence on secrecy exalts the principle of secrecy for secrecy's sake . . ." 360 U.S. at 407.

Goldstein, *The State and the Accused: Balance of Advantage and Criminal Proceedings*; 69 Yale L.J. 1149 (1960); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668, 647 (1962); and Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 445 (1965) all contend that a wider scope to criminal discovery including discovery of grand jury minutes is called for. Two state cases taking a liberal view of discovery of grand jury minutes are *Utah v. Faux*, 9 Utah 2d 350, 345 P.2d 186 (1959) and *State v. James* (Mo.) 327 S.W. 2d 278 (1959). Also contending for a wider scope to discovery of grand jury minutes is the report of the grand jury committee of the Criminal Law Section of the American Bar Association, August 10, 1963.

four out of 14 United States Attorneys surveyed admitted that there were cases the defense would have won had more discovery been allowed the defendant.<sup>89</sup> The American Bar Association Special Committee on Federal Rules of Procedure has recommended to the Judicial Conference of the United States that *disclosure be required* of grand jury minutes after indictment.<sup>89a</sup> All of these factors suggest that there is something amiss in the present administration of federal criminal justice.

The reasons given in *Proctor & Gamble* for secrecy were as follows:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was no probability of guilt".<sup>90</sup>

Once the grand jury indictment has been brought and the accused arrested these five reasons lose all merit.

When an indictment has been brought and the accused has been arrested the inapplicability of the first reason,

<sup>89</sup> Survey taken by the Junior Bar Section of the District of Columbia for the Judicial Conference of the District of Columbia, Circuit, May, 1963, reported 33 F.R.D. 47, 101 at 118. Twelve of seventeen defense lawyers surveyed stated there were cases the defense would have won with more discovery.

<sup>89a</sup> Transmitted to the Judicial Conference by resolution of the American Bar Association by letter of August 18, 1965.

<sup>90</sup> 356 U.S. at 681.

fear of the escape of the accused, is apparent. The second reason, non-interference with the delicate deliberations of the grand jury, also becomes irrelevant when the indictment has been delivered. It is not the deliberations of the grand jury nor the record of the votes of the grand jurors which is sought. That is a *secula seculorum* which remains inviolate. It is only testimony given before the grand jury that is sought.

The danger that witnesses will be tampered with—the fear of subornation of perjury by the defendant—, the third reason proffered by the Court, likewise can have no place after the indictment has been brought. The danger that witnesses will be tampered with before they testify at trial should be lessened rather than heightened when the defendant has knowledge of the fact that the witness has already gone on record as to the facts of the case. The fear of perjury as a result of additional discovery has been emphatically repudiated by the contrary experience of discovery in the civil field.<sup>91</sup> In addition this

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<sup>91</sup> Mr. Justice Brennan, speech in a symposium at the Judicial Conference of the District of Columbia Circuit, 33 F.R.D. 47, 56 at 62 (May, 1963): "I must say, in any event, I could not be persuaded then and I cannot now, that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, supports the case against criminal discovery. I should think, rather, that is complete fallacy has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been allowed and, so far as I know, no one suggests that perjury has been fostered. Indeed, the experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication. Surely that experience is solid evidence of the beneficial results of discovery to the cause of justice without the defeat of justice through perjury foretold by the prophets of doom. In any event, as has been said, 'The true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other where both are present.'"

reason makes the insulting supposition that members of the bar who represent the state may be trusted, but members of the bar who represent defendants will suborn perjury or tamper with witnesses.<sup>92</sup> This inference assumes that the defendant is in fact guilty until he proves himself innocent, thus contradicting the most basic notion of criminal justice in the United States.<sup>93</sup> Any reason predicated upon such an assumption is abhorrent to the cause of liberty and justice.

The fourth reason, encouragement of disclosure before the grand jury is, of course, irrelevant at the trial stage of the proceedings if it is ever valid at all. Witnesses may be subpoenaed at both the grand jury and trial stage of the case. It is vital to the cause of justice that the facts be brought out at trial. If information beneficial to the cause of the defense is not brought to the attention of the accused and his counsel, then a grave injustice has been done.<sup>94</sup>

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<sup>92</sup> Brennan, *ibid*, at 63.

<sup>93</sup> Goldstein, *Balance of Advantage*, at 1193.

<sup>94</sup> The fact that problems will arise in particular cases where it will be required that portions of the grand jury transcript be kept secret is no reason to doubt the general validity of the argument. As Professor Goldstein suggests, the "concept of the protective order" of section 30 (b) of the Federal Rules of Civil Procedure may well be applied to criminal discovery. *Balance of Advantage*. Mr. Justice Brennan's comments on this problem are as follows:

"The extent to which discovery should be allowed in particular cases will, of course, present complex problems. There will be questions for the exercise of sound discretion depending upon the particular materials of which discovery is sought. The showing of need of a given accused may require discovery, I think, despite strong governmental interests advanced by the prosecution against allowing it. In other words, there will be much need for the striking of a proper balance in individual cases. Surely arguments of the prosecution that, for example, witnesses might be imperiled are not wholly illusory. And to the extent discovery of the accused may be sought by the prosecution,

The fifth reason stated by the Supreme Court, protection to one who is exonerated by the grand jury, is entirely inapposite where an indictment has in fact been brought.

The most convincing evidence that the reasons for grand jury secrecy are spurious is the experience of those jurisdictions, including California, Iowa, Kentucky, and Minnesota, which require full disclosure of the transcript of grand jury testimony.<sup>95</sup> "[p]erhaps most jurisdictions are reluctant at this time to liberalize their rules of discovery

there will necessarily lurk below the surface constitutional questions arising from the privilege against self-incrimination. In short, there are problems that argue not only for judicial discretion but perhaps, for even a greater measure of discretion than has been found necessary in the area of civil discovery.

"I do not deny the force of the objections which have been raised against expanded criminal discovery. All I have attempted to suggest this morning is that these objections, if not wholly invalid, are simply not insurmountable. In any event, I have great difficulty accepting them as reasons for refusing to allow criminal discovery under appropriate judicial safeguards. Where dangers do exist and abuses are threatened, not denial of discovery but appropriate safeguards to prevent such dangers and abuses should, I think, be our effort. We found out that the civil discovery procedures could be abused, and we fashioned safeguards against those abuses. The court-made rules protecting the attorney's work product and enforcing privileges against disclosures of confidential or secret information are examples. If there is merit in the insistence that the public interest in law enforcement requires even stronger safeguards against unwarranted disclosure of the prosecution's case, surely appropriate sanctions can be devised. In the rare case, the denial of all discovery may be compelled to protect the safety of witnesses or prevent an apparent perversion of the judicial process. But I would leave the primary responsibility with the trial judge under such guidance from appellate courts as may be necessary to mark its proper limits. I do submit that the gain to the public interest in the pure and just administration of the criminal law is well worth the risks."

<sup>95</sup> See Cal. Pen. Code Sec. 938.1; Iowa Code Sec. 772.4 (1962); Ky. Crim. Code Sec. 110 (Baldwin, 1953); Minn. State Ann. Sec. 628.04 (1947).

to the extent of permitting pretrial inspection of grand jury minutes, but the experience of those that have demonstrates that no vitality is drained from the effort or success of the state in its prosecution of criminals."<sup>96</sup>

The benefits of discovery in "... notice-giving, issue-formulation and fact-revelation ..." <sup>97</sup> are at least equally applicable in the criminal field as in the civil.<sup>98</sup>

"If a procedural system is to be fair and just, it must give each of the participants to the dispute the opportunity to sustain his position. It must not create conditions which add to any essential inequality of position between the parties, but rather must assume that inequality be minimized as much as human ingenuity can do so. \* \* \* If the trial is to be the occasion at which well prepared adversaries test each other's evidence and legal contentions in the best tradition of the adversary system, there can be no substitute for a deposition, discovery, and pretrial procedure."<sup>99</sup>

The rationale of the secrecy requirement is negated by the philosophy of *Jencks v. United States*, 353 U.S. 657 (1957). Although this Court has held that the *Jencks* rule

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<sup>96</sup> Calkins, at 469.

<sup>97</sup> *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

<sup>98</sup> See the authorities cited in note 112. Even in *United States v. Proctor & Gamble*, 356 U.S. 677, 682-683 (1958), where the Court denied discovery of grand jury minutes to the defendant in a civil case this Court paused to point out that "Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor* . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. Only strong public policies weigh against disclosure."

<sup>99</sup> Goldstein, *Balance of Advantage* at 1192-93.

does not apply to grand jury minutes,<sup>100</sup> it surely is apposite as a rule of fairness.<sup>101</sup>

Formally recorded testimony before a grand jury "... an appendage of the court ..." <sup>102</sup> would seem to have a greater claim to disclosure than informally recorded statements of a government witness as to what was said long in the past.<sup>103</sup> Also in point is the decision in *Brady v. Maryland*, 373 U.S. 83 (1963) holding that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material to guilt or to punishment.

The guiding principle in *Brady* and *Jencks* is that of fairness to the accused. In *Jencks*, this Court (quoting from another leading decision), said:

"... the Government can invoke its evidentiary privilege only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes the accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense."<sup>104</sup>

It is respectfully submitted that the goal of fairness to the accused—of equal opportunity to the accused and the prosecution as articulated in *Jencks* and *Brady*—impel

<sup>100</sup> *Pittsburgh Plate Glass v. United States*, 360 U.S. 395, 398 (1959).

<sup>101</sup> Calkins at 481; Sherry at 671; Goldstein, *Balance of Advantage* at 1184 fn. 116.

<sup>102</sup> *Brown v. United States*, 359 U.S. 41, 49 (1959). The proceedings before a grand jury constitute a "... judicial inquiry ..." *Cobbledick v. United States*, 309 U.S. 323 (1940), 1327 quoting *Hale v. Henkel*, 201 U.S. 43, 66 (1906).

<sup>103</sup> See *infra*.

<sup>104</sup> *U.S. v. Reynolds*, 345 U.S. 1 at 12 (1953) as quoted in *Jencks v. United States*, 353 U.S. at 671.



the conclusion that the unnecessary veil of secrecy surrounding the grand jury transcript in the case at bar should fall.

## B

### ON THE FACTS OF THIS CASE JOHNSON WAS ENTITLED TO ACCESS TO THE GRAND JURY TESTIMONY

When the government has breached the secrecy of the grand jury as government counsel did in this case, an unfair advantage would result if a defendant were not entitled to the entire grand jury transcript. The advantage to the prosecutor of the opportunity to pick and choose as to which parts of the grand jury transcript will be opened up contrary to the direction of Section 6 (e) could well be a vital factor in shifting the balance of advantage in a criminal prosecution even further against the accused.<sup>105</sup>

The facts of this case illustrate methods by which advantage may be gained by the prosecution.<sup>106</sup> A witness is shown testimony of others given *before the grand jury*. These words are emphasized because the fact that the testimony shown the prospective witness is Grand Jury testimony is, in itself, significant to the witness. Why? Because the government hopes to use the testimony of that witness and to reinforce his confidence and thus make him a more credible witness in the eyes of the trial jury or because the government hopes that, when he and his counsel read the testimony of others, they will not wish to contradict them. Or a witness is shown his own testimony before the grand jury as to which his memory has

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<sup>105</sup> Cf. Goldstein, *Balance of Advantage* at 1152.

<sup>106</sup> The advantages gained by the prosecutor's pre-trial breach of secrecy do not apply when the government is permitted to impeach a witness at trial by his grand jury testimony.

become hazy in the hope that his memory will be jogged along certain preferred lines.<sup>107</sup>

If the accused has the same advantage of making use of the grand jury transcript, he would have the opportunity to take similar action as to the testimony before the grand jury which may be favorable to him. Thus the balance of advantage which seems to have been shifted so heavily against the accused by the prosecutor in violation of the requirement of Sec. 6 (e) would be righted. In other words a sound rule should mean that the defendant gets to look not only at the discards but rather that he is given an opportunity to play the same game himself.

The tit-for-tat notion applied by the District Court and approved by the Fourth Circuit is unsound in theory and practice. If a government witness or his counsel or both read a volume, a page or a paragraph of the transcript, under this vagary, defense counsel may do so. This rule puts the government in the anomolous position of being able to treat recorded grand jury testimony of witnesses as its private property when in fact it is the property of the court, to violate Rule 6 (e) and the vaunted "seal of secrecy" in its discretion at will with the knowledge that there is only a limited disclosure consequence. It enables the prosecution deliberately to disregard Rule 6 (e) without an adequate sanction.

It is therefore submitted that in this case the defense met the burden of *Pittsburgh Plate Glass v. United States*, 360 U.S. 395, 400 (1959) "to show that 'a particularized need' exists for the minutes which outweighs the policy

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<sup>107</sup> Quoting from the transcript at page 9: "MR. TYDINGS: . . . Mr. Finneran arrived with his counsel. He had difficulty recalling the facts and events which he was being questioned about by Mr. Weiner."

of secrecy."<sup>108</sup> The need is to right the imbalance caused by the prosecutor's flagrant disregard of the command of Rule 6 (e). As this Court stated in *United States v. Socony-Vacuum*, 310 U.S. 150, 234 (1940) "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." The defense should have been granted access to the entire grand jury transcript of testimony subject to a protective order as to any portions which the government could demonstrate required suppression.

## II

### THE FOURTH CIRCUIT WAS WRONG IN HOLDING THAT THE INTERVIEW NOTES OF THE FBI AGENTS WERE NOT PRODUCIBLE UNDER THE JENCKS ACT

Manuel Buarque, Johnson's administrative assistants testified as a defense witness that he alone prepared the speech for Congressman Johnson and he was merely furnished some facts and figures for it by Hefflin. (App. 476-482). His testimony was vital to Johnson's defense because it negated the contention of the government that the speech had been prepared by Robinson.

In order to discredit Buarque's testimony the government called as a witness FBI agent Milne, who testified that at an interview on January 11, 1962, Buarque told him that he had not met Robinson until the spring of 1961 (9 months after the speech). Since Buarque had testified that he met Edlin and Robinson in the spring of 1960 (Tr. 5471) and there was no dispute as to this, Buarque's statement to the FBI, if so made, was false.

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<sup>108</sup> Also *United States v. Proctor & Gamble*, 356 U.S. 677, 683 (1958).

On cross-examination the FBI agent stated that during the interview he made written notes from which he later prepared an interview report. "I dictated it [his interview report] from notes that were made during the course of that interview." (Tr. 5474). Buarque did not sign the notes or the later interview report (Tr. 5473) and in fact was not shown them. The agent testified that he deliberately destroyed the original notes in accordance with FBI policy (Tr. 5474-5475). Government counsel stated on the record that the notes were destroyed pursuant to instructions contained in the FBI Manual (Tr. 5503) apparently issued after the Jencks decision (Tr. 5504-5505).

Johnson moved that the agent's testimony be stricken on the ground that the notes constituted "producible" Jencks Act (18 USC Sec. 3500) material and the failure of the government to retain and produce them violated Johnson's rights. Since the interview report of the FBI was made available to the defense, the District Court denied the motion.<sup>109</sup>

<sup>109</sup> To rebut the testimony of Robinson and Johnson that the checks specified in the indictment were payments to Johnson for legitimate legal services, the Government called as a witness FBI agent Strickland who had interviewed co-defendant Robinson. The agent testified that Robinson made no mention to him of the \$1,000 retainer fee of August 1, 1960, paid to Johnson (Tr. 5479) and Robinson stated that the total fees paid to Johnson were between \$6,000 and \$7,500 (Tr. 5481). This estimate of legal fees was considerably less than the sums admittedly paid to Johnson. The agent made notes of this interview at the time and from these notes prepared a narrative statement (Tr. 5479). Robinson read, corrected and signed this statement and a copy was given to him (Tr. 5479-80).

On cross-examination the agent stated that, after he prepared Robinson's statement, he deliberately destroyed the interview notes in accordance with FBI policy (Tr. 5484-5485). At the time he did so he knew that Robinson might be called as a witness in a prosecution against Johnson and that he himself might be called to testify (Tr. 5483-84). Johnson joined in a motion to strike the agent's testimony

The Fourth Circuit recognized that, if the notes qualified as a "statement" a "serious question arises" (p. 201). That Court criticized the FBI policy with respect to the intentional destruction of interview notes. "If the notes were available, they might confirm or refute one version or another" and "one of the purposes of both the *Jencks* decision and the *Jencks* Act is to afford the defense an opportunity to impeach witnesses" (P. 202). The Fourth Circuit then erroneously held that the notes of the FBI agents did not qualify as a "statement" or as a "report" under the *Jencks* Act. In thus emasculating the *Jencks* Act the Fourth Circuit ruled that "by its terms the Act does not cover statements made either by a defendant or by a defense witness" and only the interview reports of the FBI agents were obtainable under the Act. The Fourth Circuit held that the FBI agents' interview reports were within the *Jencks* Act because in each instance the "report . . . was made by a government witness [the agent] . . . to an agent of the government" [his superior agent] but their original notes "were at most statements of Robinson and Buarque, not statements 'made by a government witness.'" (p. 202).

If accepted by this Court, this highly restrictive interpretation of the *Jencks* Act means that the original notes of a government agent are producible when the government agent interviews one who later becomes a government witness but are not producible when the agent interviews one who becomes a defense witness or a defendant. Such an attenuated distinction has not been drawn by this Court or by any other Court in the federal system.

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on the ground that the original interview notes were producible statements (Tr. 5499-5500). The Court denied the motion. Since Robinson, as general counsel for the savings and loan associations, was the best informed witness as to Johnson's legal services, any testimony impeaching Robinson necessarily discredited Johnson's defense.

(a) This far reaching interpretation of the Jencks Act by the Fourth Circuit is erroneous.

*First:* The unambiguous language of the Act indicates that the original interview notes should be deemed a statement of a "prospective government witness," the phrase used in Section 3500(a), to an agent of the government. The intent is apparently to include the statement of any person interviewed in the course of a criminal investigation.

*Second:* At the time the government agent interviews a person in the course of a criminal investigation, ordinarily there is no means of knowing whether that person will be a government witness, a defense witness or a defendant. The determination is later made by the government. Whether he will be called as a government witness at the trial depends upon whether government counsel considers his statements allegedly made to the investigating agent helpful to the prosecution. Thus under the decision of the Fourth Circuit the production of the original notes of the FBI agent under the Jencks Act is determined by the later decision of the prosecution to call as a witness the person interviewed. If so called, he may be impeached by the original notes of the agent. If he is called as a defense witness or if he is made a defendant and a government agent testifies to his alleged contradictory statements to discredit his testimony, the agent's testimony cannot be impeached by his original notes but only by his interview report submitted to his superiors. Surely there is no logic or fairness in such an attenuated distinction. Happenstance should not be the determining factor in the application of the Act.

*Third:* When a government agent testifies to oral statements made to him by a defense witness contradicting the

testimony of that witness, there is as much necessity for the defense to be able to impeach the government agent by showing a variance or an omission in his notes as in the case of a non-government prosecution witness. FBI agents, treasury agents, i.e. "Law Men" are so romanticized that, enveloped in an aura of efficiency, heroism and objective impartiality, they speak in court with a convincing authority denied the ordinary witness. The honesty of an investigating agent may be unquestioned, but his interest in a successful outcome of a case investigated by him cannot be discounted. Hence the only possible impeaching tool on cross-examination, Jencks Act material, is more, not less, essential in this case than in the situation of the ordinary nongovernment witness for the prosecution.

*Fourth:* When a government agent records written contemporaneous notes of what a person interviewed allegedly tells him and the agent later testifies for the government to such statements, his notes are not merely a "statement" of the defendant or defense witness interviewed, as the Fourth Circuit held; they should be deemed a "statement" of the government agent under Section 3500(b). So, too, his original notes should be deemed a "statement" within the definition of Section 3500 (e) (1), namely, "a written statement made by said witness and signed or otherwise adopted or approved by him." Although not signed by the witness, the original notes should be deemed "otherwise adopted or approved by him" when the government agent vouches for their accuracy. The notes are the best evidence of the agent's understanding of the statements made to him by the witness. Over a period of a year an investigating agent must interview countless persons and he could not possibly be expected to recall what each one said except upon the basis of the written record. If a government agent testified from his original notes or from an interview report



prepared from the notes in a case involving the personal liberty of one accused of crime, the original notes i. e. the "statement", should be deemed adopted or approved by the government agent. Indeed there could not be in fact an approval or adoption more significant.

*Fifth:* The principle that original notes of a government agent are Jencks Act material available to impeach that agent when he testifies at trial would seem to be well settled by authority. In *Clancy v. United States*, 365 U.S. 312, 313-14 (1961) this Court expressly held that original notes made by government agents requested for just such a purpose may be Jencks Act material. This Court's opinion by Mr. Justice Douglas holds that each memorandum by treasury agents of statements made to them by the defendants was a "statement" as that word is defined in the Act and he suggests that otherwise the Jencks Act might be unconstitutional as a restriction upon due process. The Fourth Circuit ignored this authoritative and controlling determination. The distinction made by the Fourth Circuit also seems at variance with its own decision in *Holmes v. United States*, 271 F.2d 635 (1959), where that Court explicitly rejected the contention of the government that the Jencks Act did not apply to statements prepared by a government agent who became a witness at the trial.<sup>110</sup>

Concessions by the Solicitor General in three recent cases, *Killian v. United States* 368 U.S. 231, 239 (1961), *Evola v. United States* 375 U.S. 32 (1963) and *Clancy v. United States* 365 U.S. 312, 313-14 (1961), that notes by govern-

<sup>110</sup> In accord: *United States v. O'Connor*, 273 F.2d 358 (2d Cir. 1959); *United States v. Prince*, 264 F.2d 850 (3rd Cir. 1959); *Lewis v. United States*, 340 F.2d 678, 682 (8th Cir. 1965); *United States v. Berry*, 277 F.2d 826 (7th Cir. 1960); *Burke v. United States*, 279 F.2d 824, 826 (8th Cir. 1960); *United States v. Delucia*, 262 F.2d 610 (7th Cir. 1959).

ment agents may be Jencks Act material support our position as do the opinions of this Court in both *Campbell* cases.<sup>111</sup> The legislative history of subsection (e) indicates that Congress intended that it "would include a memorandum made by an agent of the government of an oral statement to him by a government witness . . .". *Palermo v. United States*, 360 U.S. 343, 359 (1959). Surely interview notes made contemporaneously by a government agent in the presence of the witness should also be deemed such a memorandum. If a more formal interview report later prepared by the agent from his notes is the equivalent of "a memorandum", the informal original notes certainly qualify as such "a memorandum."

Original written notes contemporaneously made by an FBI agent, in the course of an interview, of statements made to him by a witness, whether read back or not read back to the witness, have a greater claim to production at a criminal trial for impeachment purposes than a later interview report prepared by the agent from his original notes. The notes constitute primary evidence of the agent's understanding of the witness prepared in the course of the interview in the presence of the person interviewed; the interview report represents secondary evidence prepared later from his notes by the agent out of the presence of the witness.

Under these conditions it would be incongruous for the Court to hold that an interview report is discoverable under (e) (1) or (e) (2) of the Jencks Act but the original notes are not. Not only would there be no logic or reason for

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<sup>111</sup> In *Campbell II* the Supreme Court, in the opinion of Mr. Justice Brennan, held that the District Judge was not clearly erroneous in finding the notes to be producible under Section 3500 (c) (1) and the interview report to be a producible copy of the notes.

such a distinction but it would do violence to the purposes of the Jencks Act in reaffirming the holding of the Supreme Court in *Jencks* that a defendant on trial in a federal criminal prosecution is entitled for impeachment purposes to relevant and competent statements of a government witness touching the events or activities to which the witness has testified at the trial. *Campbell II*, p. 92. If the statute was designed to further the fair and just administration of criminal justice, as this Court has held it was (*Campbell I*, p. 92), then, as the Solicitor General conceded in *Killian*, *Clancy* and *Evola*, interview notes should be deemed to qualify as a statement of the witness under (e) (1) and (e) (2).

The extreme notion of the Court below that the Jencks Act should be interpreted to permit an accused to impeach the testimony of a government witness, who is not a government agent, with Jencks Act material in the possession of the government, but to deny to the accused the production of the most effective material, i.e. his original notes, to impeach a government agent who has testified, seems irreconcilable with the objective of the Congress in enacting the Jencks Act not only to preclude any general pillage of government files but to implement and safe-guard the basic constitutional principles of the *Jencks* decision.

(b) The deliberate destruction of interview notes by F.B.I. operatives as standard procedure in the aftermath of the Jencks legislation<sup>112</sup> has been viewed by the federal courts as requiring a "divining" of the *bona fides* of the

<sup>112</sup> Cf. Orfeld, *Discovery During Trial in Criminal Cases: The Jencks Act*, 18 S.W. L.J. 212, 227 (1964); Cleary, *Hickman v. Jencks Jurisprudence of the Adversary System*, 14 Vand. L. Rev. 865, 874-75 (1961), *The Supreme Court, 1960 Term: Federal Criminal Law Enforcement: Discovery*, 75 H.L.R. 40, 179 at 181 fn 575 (1961).

operative in each case coming before them.<sup>113</sup> The result has been that this action pursuant to government policy has become *per se* action in good faith and sanctions have not been visited upon the government.

Assuming, as the lower federal courts have done, that the question is one of good faith to be determined in each particular case, the decision that the operative is in fact acting in good faith is in practice compelled. It would strain the bounds of credulity to believe that the courts are likely to find *mala fides* on the part of the operative when acting in obedience to his master's mandate when that master is the Department of *Justice* itself. The real question, a question that has not been adequately faced in those cases, is whether, regardless of the *bona fides* of the agent, the destruction of the interview notes should render the agent's testimony inadmissible.

The court decisions cited above assume that, if a government agent destroys evidence pursuant to a general directive of his superiors, he necessarily acts in good faith. They assume that the propriety of the government policy is beyond question. There is also inherent in these decisions the presupposition that the unverifiable testimony of a government agent that his interview report accurately embodies statements made to him by the accused or by the witnesses as contained in his interview notes (now reduced to ashes) must be deemed flawless. To the contrary, it is submitted that however able, intelligent, devoted, obedient, loyal, and well-trained FBI agents may be, the philosophy incident to these premises is foreign to the Sixth Amendment right to confrontation and to the American concept

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<sup>113</sup> *Ogden v. United States*, 323 F.2d 818, 820 (9th Cir. 1963); *United States v. Thomas*, supra p. 194; *United States v. Tomaiolo*, 317 F.2d 324, 327 (2d Cir. 1963); *United States v. Greco*, 298 F.2d 247, 249, 250 (2d Cir. 1962).

of due process, fair trial and the fallibility of the state and its agents.

When, as in the case at bar, important interview notes made by an F.B.I. agent of statements made to him by a defendant and a witness are willfully destroyed pursuant to Bureau policy, is not the inference irresistible that the only conceivable purpose of the policy is to circumvent the decision of this Court in *Jencks* and the later *Jencks* Act by precluding at the trial any verification of the interview report with the agent's actual notes of statements made to him by the witness? What other purpose could there be?

When a government agency directs its agents to destroy interview notes after they have been allegedly reduced to an interview report, the obvious effect is to preclude any comparison of the interview report with the agent's actual notes contemporaneously made with respect to statements made to him by the witness. No government department or bureau could prepare and promulgate instructions directing the *immediate* destruction of the notes without consideration of this evident consequence of the directive. Since no other conceivable purpose is served by such a policy, it must be assumed that this is its objective.<sup>114</sup> The destruction of such significant basic data by government agents is morally intolerable and shocks the conscience.

It was especially important in this case that access to the notes of the FBI agents be available to the defense. The original notes of agent Milne might well have confirmed Buarque's testimony that he met Edlin and Robinson in the spring of 1960, he told Milne that and thus Milne made an error—"1961" for "1960"—in his interview re-

<sup>114</sup> It would not appear that the Treasury Department has such a policy. See *Clancy* at 314.

port prepared from his notes. FBI agent, Strickland, testified that a significant fact was *not* related to him by Robinson. Thus Strickland was not testifying as to statements contained in his narrative report but as to what he claimed Robinson had not said to him. It became crucial for the defense to show that the FBI agent's interview report to his superiors, though signed by Robinson, did not include the additional statement Robinson testified he made to Strickland. This could be done only by the production of the contemporaneous interview notes denied the defense.

The important issue here should not be resolved in terms of the "good faith" or "bad faith" of the administrative policy of the government or in terms of the mental state of the F.B.I. agent in acting pursuant to that policy. Nor should the imposition of the sanctions of Section 4 of the *Jencks* Act be dependent upon whether the administrative policy was permissibly or impermissibly inaugurated to circumvent the decision in *Jencks* or the *Jencks* Act or to preclude cross-examination with respect to the contents of the notes or even to serve some other purpose. A sound public policy should not require the judiciary to inquire into the good faith of government officials except when such an inquiry is unavoidable.

An unlawful search or seizure is not resolved in terms of whether the police officers acted pursuant to administrative policy or upon the instructions of their superiors. Nor is the issue of the validity of a confession determinable in terms of a directive contained in a police manual. As the *Jencks* Act was designed not only to overrule exaggerated decisions of the lower federal courts misinterpreting *Jencks* but also to implement the Sixth Amendment right of confrontation and due process declared in *Jencks*, the statutory

remedy of Section 4 of the Jencks Act cannot depend upon the purpose or propriety of administrative policy.

The *Jencks Act* itself provides that in the case of dispute as to whether material is to be given to the defendant" . . . the entire text of such statement shall be preserved by the United States . . ." pending appeal by the defendant. This statutory language indicates that the requirement that the material in question must be" . . . in the possession of the United States . . ." was not intended to allow the government to suppress Jencks Act material by the simple expedient of destroying it and so deny the benefits of the Act to a defendant.

The Fourth Circuit recognized in this case the basic unfairness of the F.B.I. policy directing that interview notes be destroyed. 337 F.2d 180, 202. The Second Circuit has agreed that "it would be the better practice to preserve written notes taken on interviews of persons accused or suspected of crime." *United States v. Thomas*, 282 F.2d 191, 194 (1960). In *Killian v. United States*, 368 U.S. 231, 242 (1961) the opinion for this Court of Mr. Justice Whittaker contains the *dictum* that, if notes were destroyed by agents in good faith and in accord with normal practice, their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. But in its later opinion in *Campbell II* (*Campbell v. United States*, 373 U.S. 487 (1963)) this Court made clear that it did not accept that *dictum* by holding that in that case the Court had not considered whether sanctions should attach to the destruction by the special agent of his interview notes pursuant to F.B.I. policy. The Court was careful to state "we intimate no view on the correctness of the Court of Appeals' rulings on this" i.e., that the destruction of the notes was in good faith. (p. 491, note 5).



In *Wilson v. United States*, 162 U.S. 613, 621 (1896) it was held that the willfull destruction or suppression of evidence by an accused gives rise to a presumption of guilt. Unless an alien concept of infallible statism is to be exalted, the deliberate destruction by government agents of evidence, whether pursuant to administrative policy or not, should be deemed also suppression of evidence and thus repugnant to basic principles of due process, fair play and fair trial. The contrary view would mean that there is a nigh irrebuttal presumption that the interview report of a government agent is an accurate recital of oral statements made to him by a witness as recorded contemporaneously in his notes and the agent's unverifiable testimony to this effect is so sacrosanct as to be beyond inquiry. It is submitted that such an assumption is not compatible with the Sixth Amendment right of confrontation and present concepts of due process. Nor is it consistent with the context, high purpose and spirit of the Jencks Act.

This Court has held that suppression by the prosecution of material evidence favorable to an accused violates due process "irrespective of the good faith or bad faith of the prosecution"<sup>115</sup> thus clearly recognizing the basic constitutional right of an accused to have access to favorable evidence that is in the hands of the state regardless of the "good" intentions of the prosecution.

Accordingly, it is submitted that the Jencks Act, when interpreted in conformity with the constitutional principles enunciated in *Jencks*, required the production of written interview notes made by government agents and that the willfull destruction of such notes required the imposition

<sup>115</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See also *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Wilde v. Wyoming*, 362 U.S. 607 (1960); *Mooney v. Holohan*, 294 U.S. 103 (1935).

of the sanctions provided in Section 4 of the Act, namely, the exclusion of the agent's testimony.<sup>116</sup>

### III

#### THE DISTRICT COURT WAS WRONG IN REFUSING TO INSTRUCT THE JURY AS TO AN ESSENTIAL ELEMENT OF THE SUBSTANTIVE OFFENSE

Sec. 281 made it an offense when a member of Congress "directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered" in relation to any proceedings or matter in which an executive department of the government of the United States is interested.

The proscribed receipt of compensation cannot be accomplished without an intent on the part of the Congressman to receive the payment as compensation for his alleged services. Accordingly the statute requires concert of action on the part of the receiver and the giver.<sup>117</sup> Although it was not necessary for the jury to find a specific criminal intent, i.e., a conscious purpose of wrongdoing or evil motive, an *essential element of the offense* was that the member of Congress know, understand and appreciate that the payments made to him constituted compensation for the services rendered.<sup>118</sup>

While the statute does not define the meaning of receipt of compensation for the prohibited services rendered, established legal principles with respect to the construction

<sup>116</sup> If the Jencks Act does not apply, then due process as interpreted in *Jencks*, required the production of the notes of the F.B.I. agents.

<sup>117</sup> *May v. United States*, 175 F.2d 994, 1008-09 (majority opinion) and 1014 (dissenting opinion) (C.A.D.C. 1949).

<sup>118</sup> *United States v. Quinn*, 141 F.S. 622, 627 (S.D.N.Y. 1956).

of a penal statute of this character require the conclusion that a subjective awareness by the actor of the nature of his conduct is an essential element of the offense.<sup>119</sup> In *Smith v. United States*, 361 U.S. 147 (1959) this Court struck down an ordinance not requiring *scienter* on the part of a seller of obscene literature as a precondition of guilt. It held that the ordinance tended to inhibit expression protected by the First Amendment. That reasoning is especially relevant in the case at bar where the First Amendment activities of a Congressman are involved. Without a requirement of subjective awareness of the nature of his conduct under Sec. 281 any member of Congress could be convicted of a felony for his unwitting or unconscious acts.

In order to implement these principles Johnson requested the following instruction which was denied:

"12. The Court instructs the Jury that, if they find that Johnson sincerely believed at the time the check specified in a substantive count was received by him as compensation for bona fide legal services rendered by him to the savings and loan associations or to the land companies and that such check was not received by him as compensation for his visits to the Depart-

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<sup>119</sup> See generally *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952) involving culpable intent and *Morissette v. United States*, 342 U.S. 246 (1952) where the knowledge requirement is more closely akin to that in the case at bar. See also *Lambert v. California*, 355 U.S. 225 (1957) where this Court struck down a statute making it a criminal offense for persons convicted of a felony to fail to register as convicted felons regardless of their knowledge of the registry requirements. The Court held that a mere failure to register could not be the basis of a criminal charge without actual knowledge by the defendant of the registration requirement. In this case had the defendant Johnson "registered", i.e., informed the Justice Department that he was acting as an attorney in a criminal case and not as a Congressman, a criminal charge would not lie.

ment of Justice, the Jury must find Johnson not guilty as to said substantive count." (App. 969).

The Court also denied Johnson's equivalent requested Instruction 13 (App. 970).<sup>120</sup>

These instructions were vital in the case. Under the substantive counts the co-defendants were charged, and were put on trial, as aiders and abettors of Johnson and the jury's attention was constantly directed during the trial to the attitudes and acts of, and alleged statements made by, these co-defendants out of the presence of Johnson relative to their hopes and intentions with respect to the visits to Justice. Edlin had been quoted by Goldman as saying out of the presence of Johnson and Boykin that Johnson and Boykin "were not getting anywhere with his indictment, that it is costing him a lot of money" (Tr. 1475) and Raines quoted Edlin out of the presence of Johnson as saying "we have friends on the Hill—we have nothing to fear on our indictment. These people are interested in us and the injustice we have been done." (Tr. 172). These statements, hearsay as to Johnson, tended to shift the jury's attention away from the question of *Johnson's understanding* as to the basis of the payments to *Edlin's purpose* in causing the payments to be made. Further, the absence of a *mens rea* instruction in this case made it especially important that the jury's attention be directed at some point to the question of Johnson's understanding of the nature of the payments to him.

A fundamental objective of these instructions was to distinguish between what may have been in the mind of Edlin with respect to these checks, and what may have been in

<sup>120</sup> After the charge, these instructions were requested again by Johnson's counsel but were denied (App. 112). Johnson's motion for a new trial alleged their denial was prejudicial error. (App. 982).

the mind of Johnson. If the jury believed that Edlin considered that these sums were in payment of Johnson's visits to Justice, that was not enough to permit the jury to convict Johnson of a felony under the substantive counts. For the commission of the alleged crime, Johnson himself must have personally understood that the checks constituted compensation for his visits to Justice. Johnson was not chargeable with Edlin's mental processes but only his own. Edlin's intent was not imputable to Johnson. Johnson could not be convicted of this felony on the ground that he *ought* to have understood that the checks constituted compensation for his visits to Justice. Actual intention not constructive intention, is a prerequisite to guilt. *Robinson v. United States*, 32 F.2d 505, 509 (8th Cir. 1929), (holding in a bribery case that the intention of the donor is not imputable to the donee. Guilt is measured by one's own intention and not by the intent of someone else); *United States v. Henry*, 52 F.Supp. 161, 163 (D. Nev. 1943).<sup>121</sup>

The Court's instructions as to the defendant Johnson's knowledge were vague, ambiguous, and contradictory. The District Court made no distinction between the belief of Edlin and the belief of Johnson with respect to the receipt of the checks. Thus the case went to the jury without an instruction that Johnson's understanding of the transaction had to be determined by the jury as a necessary element of the offense.

The Court charged that it was only when the services referred to in Section 281 are rendered for compensation that there is a violation (App. 102) and that with respect to each check the jury "must consider whether each such check was *given* in whole or in substantial part for serv-

<sup>121</sup> To the same effect 11 C.J.S., Sec. 2, Bribery, p. 844; *People v. Ewald*, 302 Mich. 31, 4 N.W. 2d 456; *People v. Vollmann*, 73 Cal. App. 2d 769, 167 P.2d 545; 12 Am. Jur. 2d, Sec. 6, Bribery p. 752.

ices rendered by Johnson before the Department of Justice within the meaning of Section 281" (App. 103). (Emphasis added). Thus here the Court directed the jury to consider the purposes of Edlin and Robinson. The Court then stated: "If you find that the check referred to in Count 2 was received by Johnson as compensation for bona fide legal services rendered by him to the savings and loan associations and later to the land companies, and not, in whole or in substantial part, for services rendered by Johnson before the Department of Justice, then you should find Johnson not guilty on the second count. The same instruction applies with respect to each count 3 to 8 as well as to Count 2", etc. (App. 104).

After the portions of the charge quoted above, the Court told the jury that, if they found that Johnson did not knowingly receive a check, or a substantial part thereof, as compensation for his visits to Justice, they should acquit under the substantive counts (App. 104). This use of the word "knowingly" was clearly not enough because (1) the Court had already confused the jury, i.e., as to who had to know what about whom, by emphasizing the hopes and beliefs of the maker of the checks, (2) it contradicted other parts of the charge, (3) it merely modified the receipt of checks, (4) there was no definition as to its meanings and (5) other portions of the charge, including those quoted above, did not include this adverb.

The Courts' use of the term "knowingly" at one point in the charge with respect to Johnson's receipt of the check in question and its use of the phrase "received as compensation" in another portion of the charge could not cure the manifest error in its earlier direction to the jury that Johnson's guilt was to be determined by reference to the beliefs of Edlin or Robinson in *giving* the check. The only reasonable view of an attentive juror of these

contradictory instructions would be that there were alternative routes to the conviction of Johnson, namely, conviction could be based on either Edlin's or Robinson's understanding or on Johnson's.

As an elected representative of the people a member of Congress has not only a right, but an affirmative obligation, to protest acts of unfairness or injustice reported to him as having been done by an administrative agency or department of the government. In this case Johnson testified that he had been informed by Edlin and Robinson that the indictment against Edlin had been inspired by competitors, was without a valid basis and was grossly unjust; that by reason of these representations, he had made his visits to the Department of Justice seeking a review of the merits of this criminal case, and that he was not compensated for doing so directly or indirectly and the checks received by him were in payment of legal services rendered the savings and loan associations and later the land companies unrelated to his visits to Justice. Robinson and others testified that these representations had been made to Johnson. He confirmed Johnson's testimony that he had not received, directly or indirectly, any compensation for his visits to Justice.

Although there was no affirmative testimony that the fees paid Johnson for his legal services were excessive, if the jury believed that the payments made to Johnson for his legal services rendered the savings and loan associations and the land companies were excessive, or even merely large, they could have found Johnson guilty of the substantive offenses under the charge of the District Court *even though Johnson sincerely believed that those payments did not represent compensation for his visits to Justice.* The instructions given were at variance with the right, if



not the obligation, of a member of Congress to protest allegedly unfair and unjust administrative acts. Thus they were contrary to the intent of the statute. The instructions allowed a guilty finding in the absence of the requisite understanding of the defendant, Johnson, of the nature of the payments made to him.

### CONCLUSION

The decision of the Court of Appeals that the conspiracy count is unconstitutional should be affirmed. The autonomy and independence of Congress and the integrity of our tripartite constitutional system are at stake. While in recent years in the United States the judiciary has been the foremost champion of liberty, this has not always and universally been true. As we have shown, there were times in England when the true champion was the legislature, arrayed against both Crown and judiciary. The time may again recur when uninhibited speech in Congress will be the chief barrier to tyranny.

The holding below on the conspiracy count should be affirmed for the additional reason that it violated Johnson's Fifth and Sixth Amendments rights.

Further, we respectfully submit that this Court should make clear that, in the event of a new trial on the substantive counts, Johnson is entitled to the rudiments of a fair trial, namely, (i) access to the grand jury transcript, (ii) production of the underlying FBI interview notes under the Jencks Act and the *Jencks* decision and (iii) the essential instructions requested by Johnson.

Alexander Hamilton wrote: "Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever

appeared to me to be the great engine of judicial despotism."<sup>122</sup>

Johnson submits his case in the confidence that such an engine cannot exist as long as this Court sits.

Respectfully submitted,

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Counsel wish to acknowledge the valuable assistance rendered in connection with this Brief by Richard J. Himelfarb, a 1965 graduate of the Yale Law School.

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<sup>122</sup> *The Federalist*, p. 462 (The Colonial Press 1901).

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1965

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No. 25

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UNITED STATES OF AMERICA, *Petitioner*,

v.

THOMAS F. JOHNSON

---

**On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit**

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**BRIEF OF AMICUS CURIAE ON BEHALF OF J. KENNETH  
EDLIN URGING AFFIRMANCE**

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This brief amicus curiae, urging affirmance of the judgment below, is filed on behalf of J. Kenneth Edlin with the consent of the Solicitor General and of counsel for the respondent Johnson.<sup>1</sup>

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<sup>1</sup> The written consents have been lodged with the Clerk pursuant to Rule 42(2).

In urging affirmance of the judgment under review, the amicus fully supports the constitutional, historical and practical considerations set forth in the brief of the respondent. Those considerations, fairly viewed, compel the conclusion that Article I, Section 6, Clause 2, of the Constitution was properly applied by the court below with respect to the respondent Johnson.

The main purpose of this brief, however, is to advise the Court of the unresolved status of the appeals of two of the co-defendants in this case and of the pendency of a constitutional issue closely related to the one now under review by this Court.

Among the four co-defendants jointly indicted and tried in this proceeding were J. Kenneth Edlin and William L. Robinson, the other two being former Congressman Thomas F. Johnson and former Congressman Frank W. Boykin. Edlin, Robinson and Johnson all appealed from their judgments of conviction<sup>2</sup> and their appeals were consolidated and heard together by the Court of Appeals for the Fourth Circuit. 337 F. 2d 180. That court reversed the conviction of the respondent Johnson, remanding his case for a new trial on the conflict of interest charges. The court also affirmed outright the convictions of Edlin and Robinson on all counts. Thereupon two procedural steps occurred:

(1) The United States filed a petition for writ of certiorari to review that portion of the judgment below which had reversed the conviction of the respondent Johnson. That petition was granted on January 25, 1965, and the matter is now before this Court for consideration and resolution.

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<sup>2</sup> No appeal was taken by the co-defendant Boykin.

(2) In the meantime, timely petitions for rehearing were filed in the Court of Appeals by both Edlin and Robinson. Edlin's petition in particular emphasized the claim that the court had erred in its ruling, 337 F. 2d at 192, that

... as none of the privileges of Article I, section 6 pertain to the defendants who are not members of Congress, their attack on the first count, unlike Johnson's, is not sustained.

It was pointed out in the petition that the distinction thus drawn between Congressmen and non-Congressmen, as respects the applicability of the constitutional privilege in question, was not only dubious but had not been urged by the Government nor argued by any of the parties. No opportunity had thus been afforded the appellant Edlin to bring to the court's attention the considerations and arguments that are relevant to the distinction made by the court.

Those petitions for rehearing, duly filed on October 26, 1964, have yet to be acted upon by the Court of Appeals.<sup>3</sup> The passage of time since the filings and the nature of the constitutional issue posed make it reasonable to conclude that the Court of Appeals is withholding action on the petitions for rehearing until this Court resolves the constitutional issue raised by the Government in the instant certiorari proceeding.

It thus becomes appropriate to advise this Court briefly as to the nature of the constitutional question as yet not finally resolved by the Court of Appeals, a question that is intimately related to the one now before this Court. In so doing, however, the amicus does

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<sup>3</sup> The petition of the appellant Edlin sought in the alternative a rehearing by the original panel or a rehearing by the court en banc.

not intend to press these contentions upon this Court at this time or to ask that the related issue be resolved. On the contrary, the amicus is anxious that the issue not be resolved at this time, either by direction or indirection, so that the Court of Appeals may fully assess the issue in the light of the forthcoming decision of this Court with respect to the availability of the constitutional privilege, under the circumstances, to a Congressman.

The unresolved contentions of the amicus which are thought to make it proper in this instance to extend the constitutional privilege to these particular non-Congressmen, as set forth in the petition for rehearing below, may be summarized as follows:

(1) Article I, Section 6, Clause 2, of the Constitution states that "for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place." Thus, while this provision is frequently spoken of as providing a "privilege" or "immunity" for Congressmen, it actually puts its emphasis on forbidding the *questioning* of Congressmen outside their respective Houses. The provision plainly means that such questioning is forbidden under any circumstances outside of Congress.

(2) In order that the full, liberal design of this constitutional language may be given effect, this provision would appear applicable, in the words of the court below (337 F. 2d at 188), "whenever the motivation for making a speech is called into question"—be the occasion a criminal or a civil proceeding. And if such motivation is called into question, it becomes immaterial whether the Congressman is a formal defendant in the court proceeding. The Constitution does not speak

of an inquiry or questioning only where a Congressman is a formal party to a proceeding; it prohibits broadly and without limitation any questioning and any inquiry into the Congressman's motives in making a speech in Congress. Thus when such questioning and inquiry become central to a criminal charge or conviction of any person—be he a Congressman or a non-Congressman—the plain language and the public policy of the constitutional provision would appear applicable.

(3) The problem thus raised is not merely one in terms of the applicability or scope of the constitutional prohibition. It is also a problem as to the jurisdiction of the court before which a criminal or civil proceeding is pending. As the court below ruled, 337 F. 2d at 191, "the privilege being applicable, courts are barred from exercising jurisdiction" over the case. And if that be true, a court would have no jurisdiction to hear or decide a civil or criminal charge against *any* person if the complaint or indictment necessarily calls for an inquiry into, or a questioning of, a Congressman's motives for making a speech. See *Ex parte Wason*, 4 Q.B. 573 (1869), where a conspiracy indictment against both members and non-members of Parliament was dismissed since the motives of the members were necessarily put in issue.

(4) The central issue accordingly becomes one of determining whether the charge that the appellant Edlin conspired with others to pay Congressman Johnson to deliver a speech in the House of Representatives so necessarily involves a questioning or inquiry of the Congressman's motives as to fall beyond the jurisdiction of the District Court in this proceeding. If, in the course of proving such a conspiracy charge, it be-



comes essential to inquire into and evaluate the Congressman's motives, then the constitutional prohibition would operate to bar both the inquiry and the prosecution. As in the *Wason* case, the alleged conspiracy would not be "an indictable offense" within federal jurisdiction.

(5) So stating the issue, the appellant Edlin contends that the conspiracy count as to him was as constitutionally defective as it was relative to Congressman Johnson. To convict Edlin, it was necessary, to use the lower court's language (337 F. 2d at 189), to launch "an inquiry into Johnson's reason for delivering the speech, the very inquiry which the Supreme Court has explicitly declared to be beyond a court's power." There is, as the opinion below amply demonstrates, a complete identity between the forbidden evidence used to convict Johnson and that used to convict Edlin and Robinson. The very same inquiry, the very same evidence as to Johnson's motives, underlay the whole conspiracy charge and the conviction of the non-Congressmen.

(6) Thus the questioning of the Congressman, made necessary to secure the conviction of all the co-conspirators, called forth the constitutional prohibition with respect to the entire prosecution. And the resulting proscription of the conspiracy charge as to Edlin is fully consonant with the public policy underlying the constitutional provision in question. That policy was recognized by the court below to be one of promoting the independence of all Congressmen in the fulfillment of their public trust by avoiding restraint on free expression on the floor of either House. 337 F. 2d at 189, 191. The hazard or threat of criminal or civil inquiry into the good faith of legislative speech "may in

itself be so devastating that an innocent congressman may well fear it." 337 F. 2d at 191.

The devastating effect of potential inquiry is no less evident, however, where the inquiry takes place in a criminal or civil proceeding to which the Congressman is not a party. Can it be denied that free expression is inhibited by the threat of inquiring into a Congressman's motives in the course of a court action involving only his wife, his administrative assistant, a constituent, a friend—or even a stranger? Is the evil of inhibition any less meaningful because the Congressman himself is not a party to the proceeding or because he is not a named co-defendant? Might he not be compelled, at the pain of inhibiting his freedom of expression, to obey his conscience or a court subpoena to defend and explain his motives in this type of proceeding? Indeed, how can a non-legislative defendant adequately defend himself against the kind of conspiracy indictment here involved without calling the Congressman as a witness to explain and defend his motives in making the speech? And if such a defendant called the Congressman as a witness, could the latter be compelled to answer questions as to his motives?

These are but a few of the many questions inherent in the fact that a Congressman does not operate in a vacuum, unmindful of the possibility of others being charged with unduly influencing or perverting his actions and words on the floor of Congress. Unless he is protected against inquiries as to his motives in such circumstances, the evil which the constitutional provision was designed to preclude may well ensue. And the constitutional provision would soon lose the liberality of its intended scope.

In sum, Article I, Section 6, Clause 2, of the Constitution "nullifies sophisticated as well as simple-minded modes" (cf. *Lane v. Wilson*, 307 U.S. 268, 275) of questioning a Congressman for having delivered a speech in the House or Senate. To instill effective meaning into this provision, the questioning must be banned wherever it arises in any court action; and any complaint or indictment which is necessarily premised upon such questioning must be considered beyond the jurisdictional ken of courts.

Such, then, is the nature of the constitutional question posed by the amicus in his unresolved petition for rehearing in the Court of Appeals. There are, of course, other questions raised in that petition, such as (a) whether the use of the constitutionally impermissible evidence prejudiced Edlin's right to the unbiased consideration of the jury on the remaining counts, a prejudice found to exist with respect to Johnson; (b) whether Edlin can properly be convicted as an aider and abettor of violations of 18 U.S.C. § 281 where the conviction of Johnson, the principal and the only one could have committed the substantive crime, has been vacated; (c) whether Edlin, as an alleged payer of compensation to a Congressman, can be charged with aiding and abetting a violation of 18 U.S.C. § 281; and (d) whether the totality of prejudice arising from the repeated admission of testimony concerning Edlin's character and past criminal record was so great as to warrant reversal.

As indicated, these various contentions are set forth here so that this Court may be aware of their existence and pendency before the Court of Appeals. They involve considerations that have not been fully briefed or argued by either the Government or counsel for the

amicus. And in the event that this Court affirms the judgment below, as the amicus here urges, these matters will then be ripe for full consideration by counsel and by the court below.

Respectfully submitted,

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October 6, 1965

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 25

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS F. JOHNSON

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

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## REPLY BRIEF FOR THE UNITED STATES

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The central issue in this case is whether the speech or debate clause—designed to foster untrammelled legislative representation of the interests of the electorate—prevents the prosecution of a congressman for the corrupt act of agreeing to take a bribe to make a speech in Congress. The first section of this brief is devoted to comments on respondent's arguments on this question and supplements our main brief, where our position is more fully developed. In the succeeding sections we briefly discuss the additional issues which respondent has asked this Court to reach. These additional issues were fully considered and, in our view, correctly disposed of in the court of appeals. Moreover, most of these points have been



considered at length in previous decisions of this Court—some of them very recent—and respondent's contentions have uniformly been rejected.

# I

## THE SPEECH OR DEBATE CLAUSE

Respondent does not, and cannot, dispute the point that, conceptually, the act of taking or agreeing to take money to make a speech is quite distinct from the speech itself and that, therefore, a prosecution for such an act need in no way "question" the speech. Respondent contends, however, that prosecutions such as this should be barred on the grounds that, as a practical matter, they inevitably call the motivation of the accused congressman into question and cannot help but have a chilling influence on free legislative speech. He further contends that, even if he is mistaken as to the practical effects of such prosecutions in general, in *this* case there was an undue questioning of his speech and its underlying motivation and a consequent intrusion upon the speech or debate privilege. In our view, neither of these contentions has merit.

1. The court below (see R. 301-302) took the position, which respondent adopts, that even though the government proves the unlawful agreement or the bribe, without relying on the contents of the speech or other official action, the accused congressman is necessarily obliged to explain his motives for the speech or action. It is contended that, in these circumstances, *Tenney v. Brandhove*, 341 U.S. 367,

requires the conclusion that no such prosecutions can be maintained. In our view, both premise and conclusion are incorrect. While the congressman charged with agreeing to take a bribe may be called upon, if he is to exonerate himself, to show his motivation in taking the money alleged and proved *prima facie* to have been a bribe, his motives for making the speech or taking any other official action have, at most, indirect relevance. Moreover, under respondent's theory, motivation does not enter the case until the government has made a *prima facie* showing of the offense charged. Thus, as we have previously shown (Govt. Br. 14-15), the situation here is significantly different from that in *Tenney*, in which the content and motives of official legislative conduct were the very foundation of the lawsuit.

In any event, as we argued in our main brief, the view that the privilege applies "whenever the motivation for making a speech is called into question" (R. 299) is too sweeping a formulation. This is sharply demonstrated by the arguments put forth in the Brief of Amicus Curiae (pp. 4-7). Thus, if respondent's analysis is carried to its logical conclusion, it would appear to follow that prosecutions of non-congressmen for offering bribes to congressmen would be barred on the ground that they would "necessarily" involve the prohibited "questioning" of legislative speech. Ironically, immunizing givers as well as receivers of congressional bribes would open the way for the resurrection, in modern dress, of the sale of "protections", perhaps the most venal of the numerous abuses of

legislative power which the framers of our Constitution undeniably intended to suppress (see Govt. Br. 34-35, particularly n. 41).<sup>1</sup>

Respondent's contention that permitting prosecutions of congressmen for agreeing to take bribes in return for speeches or other official acts would have a crippling effect on the legislative process has been decisively refuted by over a century of American history. Legislation proscribing the taking of bribes by members of Congress has been part of the Criminal Code since 1853 (Act of February 26, 1853, 10 Stat. 170); yet the threat of prosecution under these laws has not prevented congressmen from taking unpopular positions or expressing views that have seemed to some to represent narrow economic interests. The judicial privilege—which, although it has a different constitutional background, is essentially the same as the speech or debate privilege in that neither the con-

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<sup>1</sup> As our main brief establishes (pp. 19-25), there is nothing in the English history of the development of the speech or debate privilege to indicate that the privilege was intended to bar prosecutions for bribery. There is no warrant for respondent's assertion—without any citation of authority (R. Br. 37-38, 46, 50, 52)—that Strode's case in 1512 shows the opposite. Not only did the prosecution of Strode arise out of his official conduct, but nothing in the historical material indicates that any "financial interest" of his, if such there was, was in any way involved in the action taken by Parliament to assert its privilege of free speech and debate. Nor is the English history as clear as respondent would have it (R. Br. 45, n. 44) on the proposition that only Parliament could punish a bribe-taking member (see Govt. Br. 33, n. 39). But even if it were clear, the precedent would not be controlling in light of the differences underlying the development of the American Congress and the English Parliament (see Govt. Br. 33-34).

tent nor motive of a judicial opinion can be "questioned"—has never been held to bar prosecutions of corrupt judges for taking bribes. And the fact that there have occasionally been such prosecutions has surely not prevented American judges from deciding cases as they see fit—without regard to the decision's popularity with the executive or legislative branch. It is true that, in the normal course of political life, congressmen legitimately receive campaign contributions, and that, therefore, there is somewhat more likelihood that unfounded charges of taking bribes might be brought against a congressman than against a judge. In our view, however, the independence repeatedly evinced by members of Congress—unaffected by the existence of the Federal bribery statute—coupled with the dearth of prosecutions in this field, show that the increased danger is negligible. It cannot be denied that there is a discernible difference between a bribe and a campaign contribution. Congress itself surely recognized the distinction in making bribe-taking by its members an indictable offense, and there is no reason to believe that Federal prosecutors and grand and petit jurors are incapable of making the same distinction.

As pointed out in the leading case of *Coffin v. Coffin*, 4 Mass. 1, 27, the central purpose of the speech or debate clause was not to protect legislators "against prosecutions for their own benefit, but to secure the rights of the people \* \* \*." Considering that accepting money to give a legislative speech subverts the normal legislative process—which the speech or

debate clause was designed to protect—and that the framers repeatedly expressed fears of legislative excess (see Govt. Br. 27–30), there are strong indications that the speech or debate clause was not intended to protect a congressman who violates his public trust by agreeing to accept a bribe to make a speech in Congress.<sup>2</sup>

Respondent's argument that, even if the privilege does not extend to prosecutions for bribery, it should cover prosecutions under 18 U.S.C. 371, is without substance.<sup>3</sup> Both the district court (App. 56) and the court of appeals (R. 301) ruled that, for the purpose of determining the applicability of Article I, Section 6, there is no material difference between a prosecution for accepting a bribe and one for conspiracy to defraud the United States by accepting a bribe. Indeed, respondent's own arguments for extending the speech or debate privilege to bar the present prosecution are so broad as to encompass a prosecution on the substantive charge of accepting bribery as well. There is no basis for respondent's allegations that the government relied upon an undefined,

<sup>2</sup> Contrary to respondent (R. Br. 50–52), nothing in *Ex parte Wason*, 4 Q.B. 573 (1869), contradicts this principle (see Govt. Br. 25–26). *Wason* merely holds that a charge that the defendants “did conspire to deceive the House of Lords by [untrue] statements made in the House of Lords” is not judicially actionable (opinion of Cockburn, J., 4 Q.B. at 575). None of the opinions in that case suggests, however, that a venal anterior agreement to take legislative action is immunized from prosecution under the speech or debate privilege.

<sup>3</sup> Respondent raises other issues relating to the conspiracy count. For clarity, those not directly tied to the speech or debate argument are considered under a separate heading (see *infra*, pp. 9–12).

"open-ended" and "protean" conspiracy in order "to circumvent" the more precise substantive bribery provisions (R. Br. 91-94).<sup>4</sup> The indictment merely reflected the nature of the offense charged; *i.e.*, a single agreement to corrupt respondent in several ways. Under this indictment, as with a charge brought under the bribery statute, the gravamen of the offense is an antecedent corrupt agreement to perform an official act for compensation. Where, as here, a continuing course of conduct rather than a single bribe is involved, use of Section 371 consistently has been deemed appropriate. See, *e.g.*, *Glasser v. United States*, 315 U.S. 60, 66; *May v. United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830; *United States v. Manton*, 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664.

2. Respondent contends that the speech was so involved in the conduct of his trial as to offend the speech or debate privilege. Even if this allegation were well founded, it would not sustain the decision below that respondent is altogether immune from pros-

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<sup>4</sup> There is no merit in respondent's contention that this action could not have been maintained under the bribery statute as it read at the time of the offense. When Congress provided for punishment of any congressman who receives or agrees to receive money "with the intent to have his action, vote, or decision influenced on any question, matter, cause, or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, or which by law may be brought before him in his capacity as such Member" (18 U.S.C. 205 (1958 ed.)), it is clear, we submit, that it intended to cover the receipt of money for a speech on the floor of Congress as to any subject which could be within congressional competence. See 18 U.S.C. 201 (1964 ed.).

ecution. In any event, the contention is without merit. As we demonstrated in our main brief (pp. 16-17), the government met its burden of proof independent of the speech or any inferences therefrom.<sup>5</sup> The testimony cited by respondent (R. Br. 48, 67-68 n. 59) does not show the contrary. The government witnesses he refers to either did not testify about the speech at all or, if they did, did not testify as to the content or the giving of the speech. The reprint of the speech introduced by the government was not used to show the contents of the speech (App. 258-260) and indeed was materially different from the official copy, introduced by respondent (App. 470), in that the reprint bore a special caption inserted for the use, and at the request, of the savings and loan associations (App. 259, 493, 931).

The indictment did not focus impermissibly on the contents of the speech. Paragraph 15 charged that

<sup>5</sup> Although not attacking the court of appeals' express finding that "the evidence [was] sufficient to support a guilty verdict on all counts" (R. 326), respondent complains of the reference by the court and the government to testimony given by witnesses Goldman and Raines which was initially admitted only against co-defendants Robinson and Edlin (R. Br. 10, 82-83; see Tr. 168-172, 421, 429). But reference to this testimony by the court of appeals reflects no misapprehension of the evidence, since it was made in the course of the court's discussion of the sufficiency of the evidence against *all* the defendants (R. 315-320). Moreover, respondent's attorney himself, in cross-examining Raines, referred to Raines' previous testimony, of which he now complains (Tr. 309) and, in cross-examining Mrs. Goldman, had her repeat her testimony as to her conversation with Edlin (Tr. 465). And in his argument to the jury, respondent's attorney referred to both the statements by Mrs. Goldman which he presently questions (Tr. 5928-5929).



among the services respondent agreed to render in exchange for compensation was the making of a floor speech defending independent savings and loan associations (App. 5-6). This reference to the contents of the speech respondent agreed to make was merely descriptive of the service to be performed. It is plain that the charge was founded on the corrupt agreement and not on the contents of the speech. Nor did the district court, in its instructions, focus "the attention of the jury upon Johnson's speech \* \* \* in as definitive a way as was possible" (R. Br. 69). The single sentence from the court's lengthy instructions relied on by respondent was expressly made applicable "particularly to the Defendant Boykin", for whose benefit it was given (App. 93-94). In that portion of the charge, the court merely pointed out that, in case the jury found that the conspiracy relating to the speech was separate from that relating to the Department of Justice, there was no evidence to show that Boykin participated in the first conspiracy.

## II

### OTHER CHALLENGES TO THE CONSPIRACY COUNT

1. Respondent argues (R. Br. 86-96) that the interpretation given to the word "defraud" (as it appears in 18 U.S.C. 371) by *Hammerschmidt v. United States*, 265 U.S. 182, and *Haas v. Henkel*, 216 U.S. 462, should now be overruled. But, as the Reviser's Note to Section 371 shows, Congress has fully recognized and accepted the broad interpretation that this

Court adopted. Pointing to a change in the statutory language which was made "[t]o reflect the construction" of the Act in cases such as *Haas*, the Reviser quotes from the opinion in that case as follows: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government" (216 U.S. at 479). This reading of the conspiracy statute, reaffirmed and refined in *Hammerschmidt*, *supra*, at 188, and approved by Congress, unquestionably embraces the conspiracy charged here. See *May v. United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830; *United States v. Manton*, 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664; see also *United States v. Vasquez*, 319 F. 2d 381 (C.A. 3); *United States v. Bowles*, 183 F. Supp. 237, 246-247 (D. Me.) and cases there collected.<sup>6</sup>

Contrary to respondent (R. Br. 89-90, 92), this long-standing construction of Section 371 does not re-

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<sup>6</sup> Respondent's reliance (R. Br. 73-75) on *United States v. Gradwell*, 243 U.S. 476, is misplaced. In that case, the charge, *inter alia*, was conspiracy to defraud the United States by bribery of voters in a federal election. This Court held the predecessor of Section 371 inapplicable on the grounds that Congress had "clearly established" its purpose of entrusting the conduct of federal elections to State law and that the conspiracy statute was concerned with "*Offenses against the Operations of the Government*" as distinguished from the processes by which men are selected to conduct such operations" (243 U.S. at 485; emphasis supplied). Moreover, even this distinction drawn in *Gradwell* has been undermined by more recent decisions in this Court. *United States v. Saylor*, 322 U.S. 385; *United States v. Classic*, 313 U.S. 299.

sult in "an unpublished penal code of ethics by judicial fiat." The government plainly has the right to "safeguard itself against being defrauded out of its right to administer an intelligent and honest service in the interests of the people." *Curley v. United States*, 130 Fed. 1, 9 (C.A. 1), certiorari denied, 195 U.S. 628. Surely, when the means of interfering with this interest are alleged to have been the giving or accepting of a bribe, neither the giver nor the receiver can have any reasonable doubt of the impropriety of his action.

2. The conspiracy count is not vague, indefinite or complex (see R. Br. 76-86). It charged respondent and his co-defendants with entering an agreement to defraud the United States of its governmental functions in two ways: (1) by having Congressman Johnson make a speech in Congress for money and, (2) by having Congressmen Johnson and Boykin, also in exchange for compensation, utilize their official positions to have the Department of Justice dismiss an indictment. The nature and scope of this charge are not, as respondent claims, to be determined solely from an examination of paragraph 14 of the indictment, which states, in general terms, the governmental rights and functions adversely affected by the conspiracy (see App. 3-5). Rather, as the trial court specifically charged (App. 91), paragraph 14 is to be read together with paragraphs 15 through 25 (App. 5-9), which set forth in particularity the objects and purposes of the conspiracy and detail the means employed to achieve them. Read in its entirety, the conspiracy count fairly informed the defendants of the offense with

which they were charged and was such that they could successfully plead former jeopardy in the event of a second prosecution. In these circumstances, the court below (R. 294) and the district court (App. 57-60) correctly held that the conspiracy count was, in the language of Rule 7(c), Fed. R. Crim. P., "a plain, concise and definite written statement of the essential facts constituting the offense charged." See *Hagner v. United States*, 285 U.S. 427, 431; *United States v. Debrow*, 346 U.S. 374, 376.<sup>7</sup>

### III

#### PRODUCTION OF GRAND JURY MINUTES

A few days before the trial, Francis Finneran—then a potential government witness, but in fact called as a defense witness at the trial (Tr. 5019)—appeared with his attorney at the United States Attorney's office. Because Finneran thought "it would refresh his recollection" (Tr. 9), he and his attorney were permitted to examine, for approximately thirty minutes, the volume of grand jury minutes containing his own testimony and that of his employee, Walter Schultise. It is possible that they also examined the testimony of one James L. Dixon, without the gov-

<sup>7</sup> Respondent's reliance on a portion of a pre-trial colloquy between the trial court and government counsel (R. Br. 79-80) for the proposition that the government did not believe its proof on the conspiracy count would have to be limited to the specifications of paragraphs 15-25 wholly disregards the government's concession, recognized by the trial court (App. 60), "that it will not attempt to prove any purposes and objects of the conspiracy except those set out in paragraphs 15 to 25."

ernment's consent (Tr. 8-10, 21, 62-63).<sup>8</sup> After ascertaining these facts and hearing counsel (Tr. 8-33), the trial court denied the defense motion that it dismiss the indictment or order pre-trial disclosure of "the entire transcript of the testimony of all witnesses submitted before the Grand Jury by the Government" (Tr. 17, 61-66). The court did, however, direct the government to furnish defense counsel with the grand jury testimony of Finneran, Schultise and Dixon. It ruled further that, if it later developed that Finneran or his counsel had examined the testimony of any other grand jury witness, it would promptly consider broadening its ruling (Tr. 63-64).<sup>9</sup>

The relief granted by the district court was plainly appropriate. The spectre of the government's carefully selecting favorable portions of the grand jury testimony to reinforce prosecution witnesses, conjured by respondent (R. Br. 110-112), finds no basis in this record.<sup>10</sup> Indeed, the witness whose memory supposedly was jogged or whose confidence bolstered

<sup>8</sup> The volume they examined was 182 pages in length and contained, in addition, the testimony of four other grand jury witnesses (Tr. 24-25). None of these witnesses (including Schultise and Dixon) testified at trial.

<sup>9</sup> As the trial court found (Tr. 63), there was no evidence to support the claim that any other witness' testimony had been read by Finneran or his attorney, and respondent does not make this claim here.

<sup>10</sup> The district court specifically refused to rule whether, by disclosing the minutes to Finneran, the United States Attorney had violated the secrecy requirement of Rule 6(c), Fed. R. Crim. P. (Tr. 64). However, the court had indicated earlier that, in its view, government counsel was not guilty of any impropriety (Tr. 13-15, 18).

by having seen part of the grand jury minutes was not called to testify for the government, but for the defense. Manifestly, the defense failed to carry the burden of showing a "particularized need" for any additional grand jury testimony, much less for all of it. See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400; *United States v. Procter & Gamble*, 356 U.S. 677, 683.<sup>11</sup>

Respondent's broader, apparently constitutional, claim that fairness always requires pre-trial disclosure of all grand jury testimony is also without substance. As the court below pointed out, secrecy is not maintained for the benefit of the government but "for the benefit of the grand jury and for the betterment of grand jury proceedings" (R. 314-315). The notion of wholesale discovery "runs counter to 'a long-established policy' of secrecy \* \* \* older than our Nation itself." *Pittsburgh Plate Glass, supra*, at 399. Respondent submits no reasons for departing from this principle which were not very recently considered and rejected by this Court in *Pittsburgh Plate Glass* and *Procter & Gamble, supra*.

#### IV

##### PRODUCTION OF AGENTS' NOTES UNDER 18 U.S.C. 3500

As rebuttal witnesses, the government called F.B.I. agent Milne, who described an interview he had with respondent's administrative assistant, Manuel Buar-

<sup>11</sup> It is noteworthy that respondent has abandoned his theory of "particularized need" presented to, and properly rejected by, the courts below (see R. 313-314).

que (Tr. 5468-5471), and F.B.I. agent Strickland, who testified as to his interview with co-defendant Robinson (Tr. 5476-5481). On cross- and re-direct examination, both agents stated that they had taken notes at these interviews, but that these were destroyed in accordance with F.B.I. procedure after they had been used to prepare formal reports (Tr. 5473-5475, 5479-5482, 5484-5485). Agent Strickland's report—which the agent said was a “verbatim copy” of what Robinson had told him (Tr. 5484)—was prepared at the time of the interview and was shown to Robinson, who made some corrections and signed it. This report was made available to the defense (Tr. 5479-5480). Agent Milne, whose report was also turned over to defense counsel for use at trial (Tr. 5472-5473), testified that he had dictated the report from his notes, and that the notes were destroyed after he had carefully proofread the interview report for accuracy and initialed it (Tr. 5475; see Tr. 5473-5474). The district court denied the defense motion to strike both agents' testimony (Tr. 5474, 5486-5487).

Even if the notes in question were producible “statements” under 18 U.S.C. 3500—which, we submit, they were not—it is clear that their destruction was not improper. Consequently, there would be no warrant for excluding the agents' testimony. This Court's ruling in *Killian v. United States*, 368 U.S. 231, 242, is fully applicable here:

As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment,



it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of [the witness'] oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by [the witness], and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. \* \* \*

See also *United States v. Hilbrich*, 341 F. 2d 555, 557 (C.A. 7), certiorari denied, 381 U.S. 941; *Ogden v. United States*, 323 F. 2d 818, 820-821 (C.A. 9), certiorari denied, 376 U.S. 973; *United States v. Greco*, 298 F. 2d 247, 249-250 (C.A. 2), certiorari denied, 369 U.S. 820.<sup>12</sup>

Although, in the circumstances, the question whether the notes are producible under Section 3500 need not be reached, we wish to point out that the court below was correct in ruling (R. 322-323) that

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<sup>12</sup> *Campbell v. United States*, 373 U.S. 487, relied on by respondent (R. Br. 123), in no way undermines *Killian*. There, unlike the situation here and in *Killian*, the "precise words" in the destroyed notes were read to the interviewee, who "had adopted this presentation" as his own (373 U.S. at 491-492). The Court in *Campbell* found it unnecessary to decide whether the sanction of 18 U.S.C. 3500(d) should apply, but pointed out that the agent's interview report, which was essentially a copy of the notes, would be available to the defense upon a new trial (see 373 U.S. at 491, n. 5, 495, n. 10).

the plain language and clear intent of the Act foreclose respondent's contention that the agents' notes were producible as "statements" of defendant Robinson and defense witness Buarque. Nor, as the court below ruled (R. 323), may the notes be considered as producible "statements" of the F.B.I. agents. The statute expressly provides only for the production of a "statement or report [as defined by Section 3500(e)(1) and (2)] in the possession of the United States which was made by a Government witness \* \* \* (other than the defendant) to an agent of the Government \* \* \*." [Emphasis supplied.] Personal work notes such as were involved here, retained by the interviewer and not communicated to any other government agent, are not within the reach of the statute.<sup>13</sup> The legislative history and case law supporting this view are set forth at length in the government's brief in *Needelman v. United States*, No. 278, O.T. 1959, pp. 17-31, certiorari dismissed as improvidently granted, 362 U.S. 600.

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<sup>13</sup> Of course, an agent's notes may be the "statement" of a government witness when they embody the witness' communication to the agent and also meet the standards of Section 3500(e)(1) and (2). Production of such notes, unlike the notes involved here, fulfills the congressional purpose of providing a communicated statement, attributable to the declarant, to test the declarant's credibility on cross-examination. See *Palermo v. United States*, 360 U.S. 343, and the government's brief in *Needelman*, *supra*.

## THE SUBSTANTIVE COUNTS

An examination of the relevant portions of the trial court's instructions on the substantive counts " (App. 99-105) refutes respondent's claim (R. Br. 125-131) that the court improperly focused on Edlin's intent in paying respondent rather than on respondent's intent in receiving the money. At several points in his charge on this issue, the trial judge made clear that, in order to convict respondent under 18 U.S.C. 281, the jury had to find that he knowingly received compensation for his services before the Department of Justice (App. 102-104). In this context, it is frivolous to suggest that the one occasion where the word "given" was used instead of "received" (App. 103), fatally prejudiced respondent (see opinion of the court of appeals, R. 325).

<sup>14</sup> In our petition for a writ of certiorari (p. 11, n. 5) we expressly reserved the right to argue that reversal of the conviction on the conspiracy count because of the speech or debate clause does not require reversal of the conviction on the substantive counts, which in no way involved the speech. In light of respondent's discussion of the substantive counts, we wish to make clear that our decision not to argue that point in our brief on the merits was based solely on the ground that that issue was not one of general importance. We continue to disagree with the court of appeals' reversal of respondent's conviction on the substantive counts. In our view, the evidence, arguments and instructions as to the two types of counts were clearly distinct, and there was no prejudice to the respondent in the trial of this case.

## CONCLUSION

For the foregoing reasons and the reasons set forth in our main brief, it is respectfully submitted that the judgment of the court of appeals should be vacated and the judgment of conviction reinstated on all counts.

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NOVEMBER 1965.

# SUPREME COURT OF THE UNITED STATES

No. 25.—OCTOBER TERM, 1965.

United States, Petitioner,	} On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.
v.	
Thomas F. Johnson.	

[February 24, 1966.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

Respondent Johnson, a former United States Congressman, was indicted and convicted on seven counts of violating the federal conflict of interest statute, 18 U. S. C. § 281 (1964 ed.),<sup>1</sup> and on one count of conspiring to defraud the United States, 18 U. S. C. § 371 (1964 ed.).<sup>2</sup> The Court of Appeals for the Fourth Circuit set aside the conviction on the conspiracy count, 337 F. 2d 180, holding that the Government's allegation that Johnson

<sup>1</sup> "Whoever, being a Member of or Delegate to Congress, . . . directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

<sup>2</sup> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

had conspired to make a speech for compensation on the floor of the House of Representatives was barred by Art. I, § 6, of the Federal Constitution which provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The Court of Appeals ordered a new trial on the other counts, having found that the evidence adduced under the unconstitutional aspects of the conspiracy count had infected the entire prosecution.

The conspiracy of which Johnson and his three co-defendants were found guilty consisted, in broad outline, of an agreement among Johnson, Congressman Frank Boykin of Alabama, and J. Kenneth Edlin and William L. Robinson who were connected with a Maryland savings and loan institution, whereby the two Congressmen would exert influence on the Department of Justice to obtain the dismissal of pending indictments of the loan company and its officers on mail fraud charges. It was further claimed that as a part of this general scheme Johnson read a speech favorable to independent savings and loan associations in the House, and that the company distributed copies to allay apprehensions of potential depositors. The two Congressmen approached the Attorney General and the Assistant Attorney General in charge of the Criminal Division and urged them "to review" the indictment. For these services Johnson received substantial sums in the form of a "campaign contribution" and "legal fees." The Government contended, and presumably the jury found, that these payments were never disclosed to the Department of Justice, and that the payments were not bona fide campaign contributions or legal fees, but were made simply to "buy" the Congressman.

The bulk of the evidence submitted as to Johnson dealt with his financial transactions with the other con-

spirators, and with his activities in the Department of Justice. As to these aspects of the substantive counts and the conspiracy count, no substantial question is before us. 18 U. S. C. § 371 has long been held to encompass not only conspiracies that might involve loss of government funds, but also "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Haas v. Henkel*, 216 U. S. 462, 479. No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process. It is the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem with which we deal.<sup>3</sup>

#### I.

The language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial. Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by outsiders representing the loan company.<sup>4</sup> The Govern-

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<sup>3</sup> Only the question of the applicability of the Speech or Debate Clause to the prosecution of Johnson is before us. The Court of Appeals affirmed the convictions of co-defendants Edlin and Robinson whose appeals were consolidated with that of Johnson and, except for a brief as *amicus curiae* submitted by Edlin, questions raised in those cases have not been presented to us. The defendant Boykin took no appeal from his conviction.

<sup>4</sup> See direct examination by the prosecution of Martin Heflin, App. 182-191, esp. 189-190:

"Q. What, if anything, did Congressman Johnson do with the material which Mr. Robinson brought in and gave to him? A. As



ment Attorney asked Johnson specifically about certain sentences in the speech, the reasons for their inclusion and his personal knowledge of the factual material supporting those statements.<sup>8</sup> In closing argument the

I recall, Mr. Johnson said that his administrative assistant . . . would go over the material, too and if I am not mistaken, Mr. Johnson called him in and Buarque took the material and I left the office with Mr. Buarque to discuss it some more.

"Q. After that meeting did you at any time thereafter have any contact either with Congressman Johnson or his office with regard to the speech? A. I telephoned a time or two there and I think I was called by Mr. Buarque and asked him about certain figures that the Institute—background material that might be supplied, and I did supply additional material and I believe Mr. Buarque sent me a draft, himself, with certain places, blank places for figures to be filled in. We had a discussion about some of the technical phases [sic] and information, statistical information and so forth.

"Q. You supplied some of the facts and figures for the draft that Mr. Buarque sent you? A. Yes.

"Q. What did you do with that draft once you had looked it over? A. Returned it."

See also cross-examination of Manual Buarque, App. 488-494; cross-examination of co-defendant Robinson, App. 772-775; cross-examination of defendant Johnson, Transcript 79-93.

<sup>8</sup> See cross-examination of Johnson, Transcript, at 84-86;

"Q. And did you not tell Mr. Heflin when he came to see you in your office after that luncheon that he should work with Mr. Buarque on the preparation of the speech which was ultimately given on June 30? A. My statement is the same as it has always been that Mr. Heflin came to my office, representing himself as a public relations man, for a certain institute of Independent Savings and Loan Associations. He had the article of one of the local newspapers. A very unfair attack which he claimed had been made on savings and loans. He talked with me a very short time. I told him that Mr. Buarque, my administrative assistant, did all of my writing, all of the conversations and if there were any answers

theory of the prosecution was very clearly dependent upon the wording of the speech.\* In addition to questioning the manner of preparation and the precise in-

to be made,—he went out with me to the next room, met Mr. Buarque and I left the two together.

"Q. You told him, did you not, that he should work with Mr. Buarque on the matter since Mr. Buarque prepared your speeches? A. I told him at the time to discuss it with Mr. Buarque and any arrangements Mr. Buarque wanted to make, why, he, of course, would be cooperative with him.

"Q. Now, you say that at that time—I assume you meant at the time of the speech—that one savings association meant nothing more to you than another. Is that what you referred to? A. Not only then but following the speech, too.

"Q. I believe you testified on direct examination that you did not know the name of First Continental Savings and Loan or First Colony Savings and Loan at the time this speech was delivered on June 30, is that your testimony? A. I think my testimony is that one name did not mean more than another.

"Q. Now, your speech was finally delivered or submitted to the clerk and it was printed in the Congressional Record, and it stresses the value of commercial mortgage guaranty insurance, does it not? A. I think it has a reference to it, yes.

"Q. Isn't it a fact that at the time of the speech, First Continental and First Colony were the only independent savings and loan associations in the State of Maryland which carried commercial mortgage guaranty insurance? A. I have no knowledge of that and did not know at the time.

"Q. You have no knowledge of that? A. None, whatever.

"Q. As a matter of fact, that language in your speech, Congressman, was a part of the language which Mr. Edlin emphasized in his reprint, was it not? A. May I say that I did not see any of the so-called 'reprints.'"

And at Transcript p. 91:

"Q. Congressman, do you mean to tell the jury that Mr. Buarque put that language in the speech about three indicted institutions

[Footnote 6 on page 6]

redients of the speech, the Government inquired into the motives for giving it.<sup>7</sup>

The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmis-

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and none convicted, and you did not inquire as to which particular institutions they were? A. He did not tell me which they were, the names.

"Q. Well, let me ask you this: How could you, if you did not know which institutions were under indictment, how could you make this statement in your speech:

"I personally do not know any of these institutions nor any of the circumstances leading to their respective indictments. I hold no brief for any of them, one way or another."

"That is the language of your speech, is it not? A. Yes, I said that is the prepared speech which had been testified that Mr. Buarque with some help from Heflin, prepared."

<sup>6</sup> See Oral Argument on behalf of the Government, Transcript, 232-248, esp. 244-245:

"I submit to you members of the jury, there is no other logical explanation you can make but that that speech was made solely for the purposes of Mr. Kenneth Edlin. It was a day's work for a day's pay for the man to whom he was selling his Congressional Office and his Congressional influence.

"Congressman Johnson has claimed on the stand in this case that he did not then know that the First Colony Savings and Loan Association was then under indictment.

"Now, you will recall the language in the speech, itself, that out of 400 independent savings and loan associations in Maryland, exactly three of them have been indicted and none convicted

"[']Personally, I do not know any of these indicted institutions nor any of the circumstances leading to their respective indictments. I hold no brief for any of them one way or the other.[']"

"Congressman Johnson claimed under oath, Members of the Jury, that he did not even bother to check the facts to ascertain whether he could truthfully make such a statement in his speech.

"If so, I submit to you, it was utterly and completely irresponsible and reprehensible, but the Government submits that that is not so and that that was not a fact. The Government submits that Congressman Johnson did know at that time that both First Colony

[Footnote 7 on page 7]

sible evidence. The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence. The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech. Johnson's defense quite naturally was that his remarks were no different from the usual congressional speech, and to rebut the prosecution's case he introduced speeches of several other Congressmen speaking to the same general subject,

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and Mr. Edlin were then under indictment in this very Court and that he, nevertheless made those statements in the speech which he delivered on June 30, 1960.

"Those statements, Members of the Jury, the Government submits were completely untrue and deceitful."

<sup>7</sup> See, *e. g.*, cross-examination of Johnson, Transcript, at 79-81:

"Q. Now, Congressman, you told Mr. Estabrook on December 1961, in London, did you not, that this speech had been made at the urging of several of your own people or of your own constituents? Is that not a fact? A. Which conference are you speaking of with Mr. Estabrook?

"Q. As a matter of fact, then, except for Mr. Buarque, whom you term a constituent, no constituent of yours ever spoke to you about making that speech on the floor of the House of Congress, is that not correct? A. It could be. I do not recall.

"Q. You would be—you would not deny it? A. No.

"Q. Is it not a fact that prior to that speech Congressman, you had never discussed savings and loan programs or problems with any of your constituents on the Eastern Shore of Maryland? A. Oh, I think possibly I had. I do not know to what degree but I want to say too, that the speech you refer to there was a motivation that Mr. Buarque testified that I was interested in a statewide election for the Senate in 1964."

argued that his talk was occasioned by an unfair attack upon savings and loan associations in a Washington, D. C. newspaper, and asserted that the subject matter of the speech dealt with a topic of concern to his State and to his constituents. We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it.

## II.

The Speech or Debate Clause of the Constitution was approved at the Constitutional Convention without discussion and without opposition. See 5 Elliot's Debates 406 (1836 ed.); 2 Records of the Federal Convention 246 (Farrand ed. 1911). The present version of the clause was formulated by the Convention's Committee on Style, but the original vote of approval was of a slightly different formulation which repeated almost verbatim the language of Article 5 of the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress . . . ." The language of that Article, of which the present clause is only a slight modification, is in turn almost identical to the English Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2.

This formulation of 1689 was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil

law to suppress and intimidate critical legislators.\* Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. See, *e. g.*, Story, Commentaries on the Constitution, § 866; 2 The Works of James Wilson 37-38 (Andrews ed. 1896). In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. As Madison noted in Federalist No. 48:

"It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved." (Cooke ed.).

The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction

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\* See generally C. Wittke, The History of English Parliamentary Privilege (Ohio State Univ. 1921); Neale, The Commons' Privilege of Free Speech in Parliament, in Tudor Studies (Seton-Watson ed. 1924).

by a hostile judiciary, is one manifestation of the "practical security" for ensuring the independence of the legislature.

In part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause. Clearly no precedent controls the decision in the case before us. This Court first dealt with the clause in *Kilbourn v. Thompson*, 103 U. S. 168, a suit for false imprisonment alleging that the Speaker and several members of the House of Representatives ordered the petitioner to be arrested for contempt of Congress. The Court held first that Congress did not have power to order the arrest, and second that were it not for the privilege, the defendants would be liable. The difficult question was whether the participation of the defendants in passing the resolution ordering the arrest was "speech" or "debate." The Court held that the privilege should be read broadly, to include not only "words spoken in debate," but anything "generally done in a session of the House by one of its members in relation to the business before it." 103 U. S., at 204.

In *Tenney v. Brandhove*, 341 U. S. 367, at issue was whether legislative privilege protected a member of the California Legislature against a suit brought under the Civil Rights statute, 8 U. S. C. §§ 43, 47 (3) (1948 ed.), alleging that the legislator had used his official forum "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances . . . ." 341 U. S., at 371. The Court held a dismissal of the suit proper; it viewed the state legislative privilege as being on a parity with the similar federal privilege, and concluded that

"The claim of an unworthy purpose does not destroy the privilege . . . . The holding of this Court in



*Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U. S., at 377.

## III.

*Kilbourn* and *Tenney* indicate that the legislative privilege will be read broadly to effectuate its purposes; neither case deals, however, with a criminal prosecution based upon an allegation that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests. However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.

Even though no English or American case casts bright light on the one before us<sup>9</sup> it is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary. In the notorious proceedings of King Charles I against Elliot, Hollis, and Valentine, 3 Howell St. Tr. 294 (1629), the Crown was able to imprison

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<sup>9</sup> Compare *The King v. Boston*, 33 Commw. L. R. 386 (Austl. 1923); *The Queen v. White*, 13 Sup. Ct. R. 322 (N. S. W. 1875); *Regina v. Bunting*, 7 Ont. 524 (1885), for commonwealth cases dealing with the general question of liability of legislators for bribery in distinguishable contexts. See 78 Harv. L. Rev. 1473, 1474.

members of Commons on charges of seditious libel and conspiracy to detain the Speaker in the chair to prevent adjournment.<sup>10</sup> Even after the restoration, as Holdsworth noted, "[t]he law of seditious libel was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government." 6 Holdsworth, *A History of English Law*, 214 (1927). It was not only fear of the executive that caused concern in Parliament but of the judiciary as well, for the judges were often lackeys of the Stuart monarchs,<sup>11</sup> levying punishment more "to the wishes of the crown than to the gravity of the offence." Holdsworth, *supra*, at 214-215. There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause. In scrutinizing this criminal prosecu-

<sup>10</sup> The court in that case attempted to distinguish between the true privilege and unlawful conspiracies:

"And we hereby will not draw the true Liberties of Parliament-men into question; to wit, for such matters which they do or speak in a parliamentary manner. But in this case there was a conspiracy between the Defendants to slander the state, and to raise sedition and discord between the king, his peers, and people; and this was not a parliamentary course.

"That every of the Defendants shall be imprisoned during the king's pleasure: Sir John Elliot to be imprisoned in the Tower of London, and the other Defendants in other prisons." 3 Howell St. Tr., at 310.

See the account in Taswell-Langmead's *English Constitutional History* (Plucknett ed. 1960), at 376-378. After the Restoration, some 38 years after the trial, Parliament resolved that the judgment "was an illegal judgment, and against the freedom and privilege of Parliament." The House of Lords reversed the convictions in 1668. See Taswell-Langmead, *supra*, at 378, note 55.

<sup>11</sup> See Holdsworth, *supra*, at 503-511.

tion, then, we look particularly to the prophylactic purposes of the clause.<sup>12</sup>

The Government argues that the clause was meant to prevent only prosecutions based upon the "content" of speech, such as libel actions, but not those founded on "the antecedent unlawful conduct of accepting or agreeing to accept a bribe." Brief of the United States, at 11. Although historically seditious libel was the most frequent instrument of intimidating legislators, this has never been the sole form of legal proceedings so employed,<sup>13</sup> and the language of the Constitution is framed

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<sup>12</sup> Compare *Thornhill v. Alabama*, 310 U. S. 88, and *New York Times Co. v. Sullivan*, 376 U. S. 254, for expressions of the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments.

<sup>13</sup> See, e. g., *Strode's Case*, one of the earliest and most important English cases dealing with the privilege. In 1512, Richard Strode, a member of Commons from Devonshire, introduced a bill regulating tin miners which appears to have been motivated by a personal interest. He was prosecuted in a local Stannary Court, a court of special jurisdiction to deal with tin miners, for violating a local law making it an offense to obstruct tin mining. He was sentenced and imprisoned. Parliament released him in a special bill, declaring "That suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, grievances, charges, and impositions, put or had, or hereafter to be put or had, unto or upon the said *Richard*, and to every other of the person or persons afore specified that now be of this present Parliament, or that of any Parliament hereafter shall be, for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament to be communed and treated of, be utterly void and of none effect." 4 Hen. 8, c. 8, as reproduced in Tanner, *Tudor Constitutional Documents*, 558 (2d ed. 1930); see Taswell-Langmead, *supra*, at 248-249. During the prosecution of Sir John Eliot in 1629 it was argued that Strode's Act applied to all legislators, but the court held that it was a private act. 3 Howell St. Trials 294, 309. In 1667 both Houses of Parliament declared by formal resolutions that Strode's Act was a general law, "And that it extends to indemnify all and every the Members of both Houses of Parliament, in all Parliaments, for and touching all

in the broadest terms. The broader thrust of the privilege is indicated by a nineteenth century British case, *Ex parte Wason*, 4 Q. B. 573 (1869), which dealt specifically with an alleged criminal conspiracy. There a private citizen moved that a magistrate be required to prosecute several members of the House of Lords for conspiring wrongfully to prevent his petition from being heard on the floor. The court denied the motion, stating that statements made in the House "could not be made the foundation of civil or criminal proceedings . . . . And a conspiracy to make such statements would not make the person guilty of it amenable to the criminal law." 4 Q. B., at 576. (Cockburn, C. J.) Mr. Justice Lush added, "I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House."

In the same vein the Government contends that the Speech or Debate Clause was not violated because the gravamen of the count was the alleged conspiracy, not the speech, and because the defendant, not the prosecution, introduced the speech itself.<sup>14</sup> Whatever room the

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Bills, speaking, reasoning, or declaring of any Matter or Matters in and concerning the Parliament, to be communed and treated of, and is only a declaratory law of the antient and necessary Rights and Privileges of Parliament." 1 Hatsell, *Precedents of Proceedings in the House of Commons*, 86-87 (1786); see Taswell-Langmead, *supra*, at 378, note 55. The central importance of Strode's case in English constitutional history is persuasive evidence that the parliamentary privilege meant more than merely preventing libel and treason prosecutions.

<sup>14</sup> The Government, however, did introduce a reprint of the speech in its case in chief, in order to show how the co-conspirators made use of it. Certain portions were shown to be outlined in red because, as the prosecution's witness testified, "these were the points most pertinent to what we were trying to put across and for ease

Constitution may allow for such factors in the context of a different kind of prosecution, we conclude that they cannot serve to save the Government's case under this conspiracy count. It was undisputed that Johnson delivered the speech; it was likewise undisputed that Johnson received the funds; controversy centered upon questions of who first decided that a speech was desirable, who prepared it, and what Johnson's motives were for making it. The indictment itself focused with particularity upon motives underlying the making of the speech and upon its contents:

"(15) It was a part of said conspiracy that the said THOMAS F. JOHNSON should . . . render services, for compensation, . . . to wit, the making of a speech, defending the operations of Maryland's 'independent' savings and loan associations, the financial stability and solvency thereof, and the reliability and integrity of the 'commercial insurance' on investments made by said 'independent' savings and loan associations, on the floor of the House of Representatives." App. 5-6.

We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when

in the person's reading it." App. 259. The use of a copy of the speech in this context necessarily required the jury to read those portions and to reflect upon its substance.

the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.<sup>15</sup>

The Court of Appeals' opinion can be read as dismissing the conspiracy count in its entirety. The making of the speech, however, was only a part of the conspiracy charge. With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.

#### IV.

The Court of Appeals held that Johnson was entitled to a new trial on the conflict of interest counts because the admission of evidence concerning the speech aspect of the conspiracy count was prejudicial on these other counts as well. The Government reserved the right to contest the order of a new trial, but, except for a footnote in its reply brief, it did not so argue in this Court, but on the contrary stated in oral argument that it stood solely on its position with reference to the conspiracy count.<sup>16</sup> In these circumstances we find no occasion

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<sup>15</sup> Cf. Note, *The Bribed Congressman's Immunity from Prosecution*, 75 *Yale L. J.* 335, 347-348 (1965).

<sup>16</sup> In oral argument, government counsel stated as follows:

"And so the question that we brought to the Court, and the only question that we think is properly involved in this case now, revolves around the taking of money to give a speech on the floor of Congress."

Question from the Bench: "Well, was there [to be] a new trial on the other phase of it?"

Government Counsel: "It [the Court of Appeals] ordered a new trial on the other phase. And we have not brought that issue here. We reserved it in our petition but we did not argue it, I might say largely because it cannot be determined without reading

to review the Court of Appeals' assessment of the record in this respect.

For the foregoing reasons we affirm the judgment of the Court of Appeals and remand the case to the District Court for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE BLACK took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

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the whole record. The question in this case which we did bring here, and which we think is the question involved, is this: Article 1, Section 6 of the Constitution provides that for any speech or debate in either House, no member of Congress shall be questioned in any other place. And as we view it, the question is does that Speech or Debate Clause mean that Congress is without power under the Constitution to make it a crime triable in court for a Congressman to take money to make a speech?"



# SUPREME COURT OF THE UNITED STATES

No. 25.—OCTOBER TERM, 1965.

United States, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.
v.		
Thomas F. Johnson.		

[February 24, 1966.]

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring in part and dissenting in part.

I concur in the limited holding of the Court that the use of the Congressman's speech during this particular trial—with an examination into its authorship, motivation and content—was violative of the Speech and Debate Clause. I also join the Court in its remand of the conspiracy count for a new trial, this time purged of offensive matter. The Court's refusal to decide the validity of the conviction under the seven substantive counts, however, prompts me to dissent. In my view, the conflict of interest counts are properly before us, raise important questions and should be resolved now since the respondent will probably raise these issues on his forthcoming reprosecution.

## I.

The Court explains its refusal to reach the substantive counts by referring to a single statement made by the Government's counsel at the outset of oral argument, pp. 16–17, n. 16, *ante*. In the same colloquy, the Government remarked that it did not consider the issues raised by the substantive counts to be of general importance, and felt that the question of the effect of the tainted evidence on these counts would unavoidably require an examination of the entire 1,300-page record.

Prior to oral argument, the Government had argued these issues exhaustively in the Court of Appeals, and had mentioned them in its petition for certiorari in compliance with Supreme Court Rule 40 (1)(d)(1) and (2), and in its reply brief on the merits. Both in its reply brief and later in oral argument, in answer to inquiries from the bench, it contended that the evidence, arguments and instructions on the conspiracy count were distinct from the substantive counts. At best, then, the Government's position is ambiguous, if not puzzling.<sup>1</sup> Beyond that, the respondent himself specifically urged this Court to consider the issues in his brief on the merits, pp. 100-101 and n. 86, devoted 33 pages of argument to this phase of the case and addressed himself to the questions on oral argument. Under these unique circumstances, I think it is our duty carefully to scrutinize all the facts and issues involved in the prosecution.

## II.

After reading the record, it is my conclusion that the Court of Appeals erred in determining that the evidence

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<sup>1</sup> I confess to some surprise that the Government almost abandoned these issues when in this Court, even though the major question in the case is the application of the Speech and Debate Clause. In the first place, this Court has not had occasion to deal with the conflict of interest statutes as applied to a Member of Congress since 1906, *Burton v. United States*, 202 U. S. 344, and they remain viable although lately revised, see Manning, *Federal Conflict of Interest Law 14-73* (1964). Moreover, the Government itself has argued strenuously and successfully in many cases that an erroneous conviction on one count does not vitiate a conviction on other counts, especially where concurrent sentences are involved, see, e. g., *United States v. Romano*, 382 U. S. 132; *United States v. Gainey*, 380 U. S. 63, 65; *Sinclair v. United States*, 279 U. S. 263, 299; *Barnard v. United States*, 342 F. 2d 309 (C. A. 9th Cir.), certiorari denied, 382 U. S. 948. There are, in addition, numerous cases in which the issue was raised in this Court and the petitioner-defendant was denied certiorari.

concerning the speech infected the jury's judgment on the substantive counts. The evidence amply supports the prosecution's theory and the jury's verdict on these counts—that the respondent received over \$20,000 for attempting to have the Justice Department dismiss an indictment against his co-conspirators, without disclosing his role in the enterprise. This is the classic example of a violation of § 281 by a member of the Congress.<sup>2</sup> See *May v. United States*, 175 F. 2d 994, 1006 (C. A. D. C. Cir.); *United States v. Booth*, 148 Fed. 112, 117 (D. C. D. Ore.). The arguments of government counsel and the court's instructions separating the conspiracy from the substantive counts seem unimpeachable. The speech was a minor part of the prosecution. There was nothing in it to inflame the jury and the respondent pointed with pride to it as evidence of his vigilance in protecting the financial institutions of his State. The record further reveals that the trial participants were well aware that a finding of criminality on one count did not authorize similar conclusions as to other counts, and I believe that this salutary principle was conscientiously followed. Therefore, I would affirm the convictions on the substantive counts.

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<sup>2</sup> The sentence given was lenient—six months on each count, but all to run concurrently. The conspiracy statute, 18 U. S. C. § 371, authorizes a five-year prison term and a \$10,000 fine, and the conflict of interest statute in effect at the trial permitted a two-year sentence and a \$10,000 fine for each violation, 18 U. S. C. § 281.